# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~448.~~ 276 30

BEVERLY TOMPKINS, THOMAS B. SWANN, ET AL., PLAINTIFFS IN ERROR,

vs.

ALFRED A. THORNTON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

**FILED APRIL 25, 1870.**

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INDEX.


| | Original. | Print. |
|---|---|---|
| Summons | 1 | 1 |
| Return | 2 | 1 |
| Bill of complaint | 3 | 2 |
| Exhibit No. 1 | 8 | 3 |
| No. 2 | 30 | 12 |
| Decree nisi | 32 | 13 |
| Bill taken for confessed, &c | 32 | 13 |
| Guardian ad litem appointed | 32 | 13 |
| Answer of R. M. Tompkins | 34 | 14 |
| Special report of A. T. Laidley, special commissioner | 38 | 16 |
| Exhibit B | 39 | 16 |
| C | 40 | 17 |
| Amended bill | 41 | 17 |
| Exhibit X | 47 | 20 |
| B | 56 | 24 |
| C | 59 | 26 |
| Alias summons in chancery | 63 | 27 |
| Return of marshal | 64 | 27 |
| Decree nisi on amended bill | 65 | 28 |
| Answer of R. M. Tompkins | 65 | 28 |
| Exhibit No. 1 | 76 | 32 |
| No. 2 | 80 | 34 |
| No. 3 | 81 | 35 |
| No. 4 | 83 | 36 |
| Answer of Thomas B. Swann | 84 | 37 |
| B. Tompkins | 89 | 39 |
| H. P. Tompkins and T. G. W. Tompkins | 91 | 40 |

| | Original. | Print. |
|---|---|---|
| Answer of John C. Brown and wife | 93 | 41 |
| William H. Tompkins | 94 | 41 |
| infant defendants | 98 | 43 |
| Decree | 101 | 45 |
| Report of commissioner, and notice | 104 | 45 |
| Affidavits to notice | 105 | 46 |
| Petition of Hewitt, Norton & Co | 115 | 51 |
| Report of C. Hedrick, special commissioner | 123 | 54 |
| Notice | 124 | 54 |
| Report of sale | 124 | 55 |
| Exceptions to report | 128 | 56 |
| Affidavit of Andrew Tucker | 128 | 56 |
| William H. Tompkins | 129 | 57 |
| Thomas F. Holt | 129 | 57 |
| William H. Turner | 130 | 57 |
| William D. Shrewsbury | 130 | 57 |
| L. Ruffner | 131 | 58 |
| David L. Ruffner | 133 | 59 |
| James Norton | 134 | 59 |
| Nathan Stanley | 134 | 59 |
| Henry C. Dickinson | 136 | 60 |
| Agreement | 138 | 61 |
| Decree | 140 | 61 |
| Report of C. Hedrick, special commissioner | 143 | 63 |
| Report of Commissioner W. H. Hogeman | 145 | 64 |
| Exceptions to report | 154 | 69 |
| Deposition of William H. Tompkins | 155 | 69 |
| Depositions of complainants' witnesses | 161 | 72 |
| Receipt of sheriff | 165 | 73 |
| Indorsement | 166 | 74 |
| Receipt | 166 | 74 |
| Clerk's certificate | 168 | 75 |
| Petition for writ of error | 169 | 75 |
| Writ of error | 186 | 80 |
| Citation | 188 | 81 |
| Bond | 190 | 81 |

1 *Record.*

ALFRED A. THORNTON, COMP'T,
*vs.*
BEVERLY TOMPKINS AND OTHERS, DEF'TS.

UNITED STATES OF AMERICA,
*District of West Virginia, ss:*

Pleas before the judge of the district court of the United States for the district of West Virginia, at Charleston, the 30th day of November, 1869, and in the 94th year of the independence of the United States.

Be it remembered that heretofore, to wit, on the 27th day of February, 1867, came Alfred A. Thornton, by his counsel, and sued out of the clerk's office of the district court of the United States for the district of West Virginia, at Charleston, a summons in chancery against Beverly Tompkins and others; which writ, with the return thereon endorsed, is in the word and figures following, to wit:

*Summons in chancery.*

The President of the United States of America to the marshal of the district of West Virginia, greeting:

You are hereby commanded to summon Beverly Tompkins & Sarah, his wife, William H. Tompkins, John G. W. Tompkins, H. P. Tompkins, Thomas B. Swann and Mary, his wife, John C. Brown and Virginia, his wife, Ellen R. Tompkins, Rachel M. Tompkins, in her own right,
2 and as executrix of William Tompkins, deceased, citizens and inhabitants of the State of West Virginia, and of the judicial district thereof, if they be found in your district, to appear before the judge of the district court of the United States for the said district at Charleston, at rules to be held in the clerk's office of our said court, on the first Monday in March next, to answer a bill in chancery exhibited against them in our said court by Alfred A. Thornton, citizen and inhabitant of the State of Kentucky, and have then there this writ.

Witness the Hon. John J. Jackson, jr., judge of the said court at Charleston, this 27th day of February, anno Domini 1867, and in the 91st year of the independance of the said United States.

[SEAL.] JASPER Y. MOORE,
*Clerk U. S. D. C. D. W. Va.*

*Return on writ.*

KANAWHA COUNTY, *to wit:*

Benjamin F. Wyatt this day personally appeared before the undersigned justice, and made oath that on the 28th day of Feb'y, 1867, he delivered an office copy of this writ to Beverly Tompkins and Sarah, his wife, and on the 4th day of March, 1867, he delivered office copies of this writ to John G. W. Tompkins, H. P. Tompkins, Virginia Brown, Ellen R. Tompkins, Rachel M. Tompkins, in her own right and as ex'x't'x of W'm Tompkins, and that he travelled, in serving this process, 36 miles in going, and 36 miles in returning; and at
3 same time and place John Sentz made oath that on 2nd March, 1867, he delivered office copies of this writ to Thomas B. Swann, and Mary, his wife, and on 4th March, 1867, W'm Tompkins and John

Brown not being found at their actual place of residence, he delivered a copy of this writ to Ellen Tompkins, wife of W. H. Tompkins, a white person over the age of 16 years, at the place of residence of the said W. H. Tompkins, and explaining the purport thereof to her; and on the same day he delivered a copy of this writ to Mrs. Mary Brown, a white person over the age of 16 years, at the residence of John C. Brown, and explained to her the purport thereof, she being a member of the family of said Brown.

Given under my hand this 12th day of March, 1867.

JNO. A. TRUSLOW, *J. P.*

And at another day, to wit, at rules held in the clerk's office of the district court of the United States for the district of West Virginia, at Charleston, on the first Monday in the month of March, 1867, came the complainant, by his counsel, and filed his bill of complaint against the defendants; which bill is in the words & figures following, to wit:

*Bill.*

To the Hon. John J. Jackson, jr., judge of the United States district court for the judicial district of West Virginia:

4 Humbly complaining to your honor, your orater, Alfred A. Thornton, who is a citizen and inhabitant of the State of Kentucky, that at the February term of the Kanawha County court he obtained a judgement against Beverly Tompkins, a citizen and inhabitant of the county of Kanawha, and State of West Virginia, for the sum of $2,210 00, with legal interest on $750 00, part thereof, from 26th August, 1856, and like interest on $100, other part thereof, from 21st October, 1857, till paid, and like interest on $1,540, residue thereof, from 1st January, 1860, till paid, and costs, $6 91c. Your orater caused a writ of fieri facias to be issued on said judgement, which was placed in the hands of the sheriff of Kanawha County, and which was returned, "no property found." Your orater also caused said judgement to be docketed a judgement lien on 30th March, 1864; all of which will fully appear by referrence to a copy of said judgement herewith filed as Exhibit No. 1. The said Beverly Tompkins intermarried with one Sarah Tompson, who is one of the heirs-at-law of Francis Thompson, dec'd, and who inherited an undivided interest in a large and valuable real estate situate in the county of Kanawna as such heir-at-law. And the said Beverly Tompkins having had issue born alive to him from the said Sarah, is

5 entitled to an estate for life in the real estate that descended to her from her said father. A portion of the heirs of the said Francis Thompson have instituted suit for the partition of his real estate, and as soon as the same is had a copy of the partition deed will be filed with the papers of this cause as part of this bill. William Tompkins, the father of the said Beverly, this life in the year 1857, having first made his last will and testament, which has been duly admitted to probate, and a copy of which is herewith filed as part of this bill, marked Exhibit No. 2; by which said will he devised a large and very valuable real and personal estate, all of which is situate in the counties of Fayette, Kanawha, Putnam, and Mason, and in this judicial district, to his wife, Rachel M. Tompkins, for life, remainder in fee to his children, Beverly Tompkins, William H. Tompkins, John G. W. Tompkins, H. P. Tompkins, Mary, who intermarried with Thomas B. Swann, Virginia, who intermarried with John C. Brown, and Ellen R. Tompkins, jointly and equally. All of the parties who take under said

will are citizens and inhabitants of the State of West Virginia and of this judicial district. By the terms of said will Rachel M. Tompkins was appointed executrix, (she afterwards qualified as such,) and power and authority was given her to make advances in land and money
6 to such of the children as she saw fit. Under this power, as your orater is informed, Rachel M. Tompkins has made some small advances to the said Beverly. But your orator denies that said Rachel had power to advance to said Beverly money or other personal estate to an amount greater than said Beverly's share of the personal estate, and he charges that the creditors of said Beverly, and particular the judgement creditors, who have a specific lien, cannot be deprived of their lien on the reversion or remainder of an seventh part of all the real estate of which the said William Tompkins died seized, by any advances in money or other personal estate made by the executrix to said Beverly, particularly if the said advances were made subsequent to the rendition of your orater's judgement. Your orater is informed that there is no pretense that any advance has been made to said Beverly in lands.

Your orater therefore avers that by reason of his aforesaid judgement, he has a lien upon all the real estate of the said Beverly Tompkins, including his life estate in all the lands which the wife of said Beverly inherited from Francis Thompson, and the real estate which was devised by William Tompkins to said Beverly, the latter being
7 the vested remainder in one undivided seventh part of all the lands of which said William died seized, and that he has a right to subject the same.

To this end he prays that Beverly Tompkins and Sarah, his wife, William H. Tompkins, John G. W. Tompkins, H. P. Tompkins, Thomas B. Swann and Mary, his wife, John C. Brown and Virginia, his wife, Ellen R. Tompkins, Rachel M. Tompkins, in her own right, and as executrix of William Tompkins, dec'd, be made parties def'ts to this bill, and true and perfect answer make to the same; that the said Rachel say what advances she has made to the said Beverly, and when, giving date of each them, the character of each advance, whether real or personal: that the share of the said Beverly in the real estate of his father be laid off and assigned to him, subject to the life estate of his mother; that all the real estate of the said Beverly be subjected to sale in satisfaction of your orater's judgement; and that your orater have such other further and general relief as the exigencies of his cause requires.

ALFRED A. THORNTON,
*By counsel.*

WM. A. QUARRIER, *Sol.*

8 The exhibits referred to in the foregoing bill are in the words and figures following, to wit:

EXHIBIT No 1.

THORNTON *vs.* B. TOMPKINS. } Judgment.

"ALFRED A. THORNTON "*vs.* "BEVERLY TOMPKINS. }

"Kanawha County Court, Feb'y term, 1861.—In debt.

"Office jud't conf'd for $2,210 00, with legal interest on $750 00, part

thereof from the 26th day of Aug't, 1856, until paid: and like interest on $100 00, other part thereof from the 21st day of October, 1857, until paid; and like interest on $1,540 00, residue thereof from the 1st day of January, 1860, until paid; and costs, $6 91c.

"A copy. Teste:

"JNO. SLACK, *Clk.*

"(Docketed 30th March, 1864.)"

EXHIBIT.

9

*Partition deed between W'm Tompkins' heirs.*

This deed, made the 20th day of April, in the year 1867, between Rachel M. Tompkins of the first part, Beverly Tompkins of the second part, William H. Tompkins of the third part, John C. Brown and Virginia, his wife, of the fourth part, R. Ellen Tompkins of the fifth part, Henry P. Tompkins of the sixth part, John G. W. Tompkins of the seventh part, and Thomas B. Swann, and Mary, his wife, of the eighth part, all of the county of Kanawha, and State of West Virginia.

Whereas William Tompkins, late of the said county of Kanawha, did, by his last will and testament, which was duly recorded in the said county on the 8th day of June, 1857, in the circuit court thereof, give to his wife, the said Rachel, all of his estate of whatsoever kind, to have and to hold the same during her natural life, remainder to their children, and by the third clause of said will did authorize and empower his wife to make such advancements to the children aforesaid, from time to time, as she should think best from them, in lands, money, or slaves, or either, and make out and execute any necessary conveyances therefor.

And whereas the said Rachel, acting under the power and authority aforesaid, has already made partial advancements to some of the said children, and all of them have reached that period in life when it is desireable that they should have the property and means of the estate to manage and control for their own benefit; and the said Rachel being now anxious to make a fair and equal division and distribution of said estate, according to the intent and meaning of said testator, and the other parties in interest concurring in that wish, it is therefore the purpose and intention of the parties to this deed that there shall be a

10 full and final settlement, distribution, and division of said estate.

Now this deed witnesseth, that, for and in consideration of the premises, and for the further consideration of one dollar to them in hand paid by the said Rachel M. Tompkins, Beverly Tompkins, William H. Tompkins, John C. Brown & wife, R. Ellen Tompkins, Henry P. Tompkins, and John G. W. Tompkins, do grant unto the said Mary Swann, subject to the marital rights of her husband, the said Thomas B. Swann, therein, a certain tract or parcel of land, situate in the county of Mason and State of West Virginia, on the south side of the Kanawha River, about six miles from the mouth of said river, containing 666 acres, more or less, being the same tract known as the Puffenbarger Place, which was owned by the said William Tompkins at his decease, and the deed and titles of which are on record in the recorder's office of Mason County, and are here referred to for a more particular description of the premises hereby conveyed; and the said Thomas B. Swann and Mary, his wife, do hereby covenant and agree to and with the said Rachel M. Tompkins, Beverly Tompkins, Wm. H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, and

John G. W. Tompkins, that they have received, in the advancement herein made, there full share and proportion of the estate of the
11 said William Tompkins, dec'd, and they hereby release any other or further claim, at law or in equity, to any other part or portion of said estate.

And this deed further witnesseth that, in consideration of the premises and for the further consideration of one dollar to them in hand paid, they, the said Rachel M. Tompkins, Beverly Tompkins, William H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, H. P. Tompkins, John G. W. Tompkins and Thomas B. Swann and wife, do grant unto the said Henry P. Tompkins a certain tract or parcel of land situate in the county of Kanawha, on the east side of the Kanawha River, being part of the tract called "Cedar Grove;" the part which is conveyed being bounded and described as follows: Beginning at the lower corner of said "Cedar Grove" tract, at or near the mile branch; thence up the Kanawha river, and with the meanders thereof to the stone fence that runs across the bottom above Kelly's Creek and above the white house; thence with said stone fence to the turnpike road; thence down the road to the point known as the walnut tree hollow, about 300 yards below the white house; thence up the hill with the fence to the top of the said hill; thence in a straight line to the old mill site on Kelly's Creek, about 100 yards above the present mill; thence up Kelly's Creek, and with the meanders thereof, to the back line of the "Cedar Grove" tract; thence with the outer and exterior boundaries of
12 said tract to the place of beginning. And the said Henry P. Tompkins doth covenant and agree to and with the said Rachel M. Tompkins, Beverly Tompkins, William H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, John G. W. Tompkins and Thomas B. Swann and wife, that he has received in the advancement above made his full share and proportion of the estate of the said William Tompkins, dec'd, and he doth release any other or further claim at law or in equity to every other part or portion of said estate. But the tract of land conveyed above to the said Henry P. Tompkins includes the mansion house and premises on which the said Rachel M. Tompkins resides; and she, the said Rachel M. Tompkins, expressly reserves for herself and to her own use and disposal during her natural life the mansion house aforesaid, and the yard, and gardens, and orchards, and all the necessary out-houses attached thereto; and at her death the house and premises hereby reserved to go in absolute fee to the said Henry P. Tompkins.

And this deed further witnesseth that, for and in consideration of the premises and for the further consideration of one dollar to them in hand paid, they, the said Rachel M. Tompkins, Beverly Tompkins, William H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, Thomas B. Swann and wife, do grant unto the said
13 John G. W. Tompkins a certain tract or parcel of land situate in the county of Kanawha, on the east side of the Kanawha river, the same being the upper part of the tract called "Cedar Grove," and embracing all of the said tract not heretofore conveyed in this deed to Henry P. Tompkins: and the said John G. W. Tompkins covenants and agrees to and with the said Rachel M. Tompkins, Beverly Tompkins, William H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins and Thomas B. Swann and wife, that he has received in the advancement aforesaid his full share and proportion of the estate of the said William Tompkins, dec'd, and he doth hereby release

any other or further claim, at law or in equity, to any other part or portion of said estate.

And whereas, in the division of the "Cedar Grove" tract to the said Henry P. Tompkins and John G. W. Tompkins, as made above, the said John has obtained a larger quantity of land in acres than the said Henry, now the *the* said John doth hereby agree to and with the said Henry that he will give him the privaledge and choice of purchasing within ten years from this date at the rate of three dollars per acre at such place or places on his part of the tract as he, the said John, may designate, a quantity of land sufficient to make the two shares equal in quantity.

And this deed further witnesseth that, for and in consideration of the premises, and for the further consideration of one dollar to them
14 in hand paid, they, the said Rachel M. Tompkins, Beverly Tompkins, William H. Tompkins, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins and Thomas B. Swann and wife, do grant unto the said Virginia Brown, wife of the said John C. Brown, and subject to the marital rights of her husband therein, a certain tract or parcel of land situate in the county of Kanawha, on the west side of the Kanawha River and near the mouth of Coal River, it being part of the tract known as the "Valcoulon tract," the portion hereby conveyed being bounded and described as follows: Beginning at a stake on the river bank, at the mouth of the lane below the old steam mill, the same being the upper corner of the said "Valcoulon tract;" thence 53 N. 141 poles 15 links, to a beech on the north side of Tacket's Creek; thence S. 10½ E., crossing Tackett's Creek at 3 poles, in all 27 poles to the turnpike; thence N. 59 W. 24 poles to a stake; thence S. 79½ W. 16 poles to a stake; thence N. 63¼ W. 28 poles to a stake in the turnpike; thence with the turnpike, crossing Tackett's Creek bridge, to a point opposite the mouth of a small drain in the point of the ridge in the forks of Tackett's Creek; thence S. 46 W. 29 poles to a large oak stump; thence S. 57 W. 225 poles to three dogwoods and three sourwood pointers; thence S. 5,474 W. 196 poles to the original Gallitan back line; thence with said back line N. 30¾ E. 322 poles to two white oaks,
15 chestnut oak, two dogwood and hickory; thence S. 67 E. 252 poles to a stake near the corner of the woods; thence N. 66½ E. 77 poles to an elm on the road, 73 E. 155 poles to a stake on the river bank; thence up the river and with the meanders thereof 110 poles to the place of beginning. But the tract of land hereby conveyed to the said Virginia Brown includes a brick house and the yard and garden attached thereto on the turnpike road, which are not intended to be embraced in this conveyance, and the said house, yard, and garden are hereby expressly excepted and reserved from this conveyance. And the said John C. Brown and Virginia, his wife, do hereby covenant and agree to and with the said Rachel M. Tompkins, Beverly Tompkins, W'm H. Tompkins, R. E. Tompkins, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann and wife, that they have received in the advancement aforesaid their full share and proportion of the estate of the said William Tompkins, dec'd, and they hereby release any other or further claim, at law or in equity, to any other part or portion of said estate.

And whereas large advancements have been heretofore made to the said Beverly Tompkins, from time to time, by the said Rachel M. Tompkins, in money amounting in the agregate to the sum of seventeen thousand dollars, ($17,000,) which amount he hereby acknowledges and admits that he has received for said estate by way of advancement:

16 In order to equalize the share of the said Beverly Tompkins in the said estate, the said Rachel M. Tompkins, William Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann & wife, do hereby grant unto the said Beverly Tompkins a tract or parcel of land in the county of Kanawha, being an undivided interest of three hundred acres of the Steele survey of 27,000 acres lying back of the Burning Spring, on the east side of the Kanawha River. And the said Beverly Tompkins doth hereby covenant and agree to and with the said Rachel M. Tompkins, William H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann and wife, that he has received in the advancement above made, together with the advancements that he has already received, his full share and proportion of the estate of the said William Tompkins, dec'd, and he doth release any other or further claim, at law or in equity, to every other part of portion of said estate:

And the said Rachel M. Tompkins, William H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann and wife, being willing and desirous of making a settlement and provision out of their several interests and portions in said estate, for the maintainance and support of the wife and children of the said Beverly Tompkins, do hereby grant unto

17 Henry P. Tompkins, for the uses and trusts hereinafter declared, a certain tract or parcel of land situate in the county of Kanawha, on the west side of the Kanawha River, below and near the mouth of Coal River, it being a part of the 'Valcoulon tract;' the part hereby conveyed being bounded and described as follows: Beginning at a locust on the river bank, just below the landing now used by the said Beverly, thence S. 67½ W. 149 poles to a stake on the side of the road; thence N. 13 W. 31 poles 15 links to a gate post; N. 67½ W. 15 poles 16 links to a beech; N. 86¼ W. 22 poles 3 links to a beech; N. 87¼ W. 59 poles 15 links to a beech; S. 86 W. 31 poles 10 links to a beech; S. 88¾ W. 15 poles to a beech; S. 72½ W. 31½ poles to a sycamore; S. 69¾ W. 24 poles to a beech; S. 68 W. 25 poles 10 links to a small beech in Gallatin's back line; S. 30¼ W. 105 to two white oaks, chestnut oak, two dogwoods and a hickory; S. 67 E. 252 poles to a stake near the corner of the woods; N. 66½ E. 77 poles to an elm by the road; N. 73 E. 155 poles to a stake on the river bank; thence down the river to the beginning: In trust that he, the said Henry P. Tompkins, will hold the tract of land, herein last conveyed, for the sole use and benefit of the wife and children of the said Beverly Tompkins, and free from any debts, demands, or claims of him, the said Beverly Tompkins; and upon this further trust that he, the said Henry P. Tompkins, will apply the rents, issues, and profits of the tract of land hereby conveyed to the use

18 and benefit, maintainance and support of the wife and children of the said Beverly Tompkins; and as it is known to the parties making this grant that the said Beverly Tompkins is embarrassed with debt, and it being their intention, as before stated, to make a provision for his family, the said grantors do hereby expressly declare that the said property shall not in any mode or manner be subjected to, or made liable for, the debts of the said Beverly, either those now exhisting or that may be created in the future; and whereas the said Rachel M. Tompkins has conveyed her life estate in the property above conveyed, and that hereinafter conveyed, and the other parties in interest are willing to grant and convey to her a certain part of said estate, in absolute

fee in consideration of the same, free from any other or further claim or demand on their part:

Now this deed further witnesseth that, in consideration of the surrender of her life estate in the property hereinabove conveyed, and of that hereinafter conveyed, they, the said Beverly Tompkins, William H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann and wife, do grant unto her, the said Rachel M. Tompkins, in absolute fee, free from any other or further claim or demand from them, or either of them, the following property, to wit: The salt furnace and the lands at-
19 tached thereto, now in the possession of A. P. Fry, under a lease, including the dwelling-house on said premises and the coal land belonging to the same, (excluding therefrom the coal land in the Steele survey, heretofore conveyed to Beverly Tompkins;) also a house and lot, in the town of Malden, in the county of Kanawha, known as the Miller house, adjoining the Methodist church; also, all debts due to the estate of the said William Tompkins, dec'd; but it is expressly understood and agreed that the said Rachel M. Tompkins shall proceed to collect said debts as soon as possible, and out of the proceeds of the same shall pay all the debts due from the estate, and shall retain as her own property the surplus, if any, after the payments of the debts due from the estate as aforesaid; and the parties hereto shall not be chargeable with any of the debts from the estate, unless there should be a deficiency in the amount collected from the debts due to the estate, as aforesaid, and if such deficiency should occur, the interest of each party hereto shall be charged pro rata with the same, and the amount due or chargeable to each of the parties respectively shall constitute a lien on his or her share respectively; and the said Henry P. Tompkins doth hereby grant to the said Rachel M. Tompkins, for and during her life, the mansion house where she how resides, and the yard, gardens, out-build-
20 ings, and orchards thereto attached, and after her death the same to revert to him, the said Henry P. Tompkins, in fee.

And this deed further witnesseth that the said Rachel M. Tompkins, Beverly Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann and wife, do grant unto the said William H. Tompkins, as and for his share of the said estate, the following property: A certain tract or parcel of land in the county of Kanawha, on the west side of the Kanawha River, being part of the Valcoulon tract, and bounded as follows: Beginning at a locust, corner to the tract above conveyed to Henry P. Tompkins, trustee, on the river bank; thence down the river, and with the meanders thereof, 123¼ poles to a stake: thence S. 85 W. 130 poles to a locust by the road; N. 2¾ E. 17 poles 5 links to a stake by the branch; up the branch N. 67¼ W. 21 poles 15 links to a beech; N. 50 W. 35 poles 15 links to a beech; N. 57¼ W. 19 poles 5 links to a beech; N. 30¾ W. 14 poles to a poplar; N. 47¼ W. 18 poles 20 links to 3 beech pointers in a small drain, in original Gallatin's line; thence with said Gallatin's line S. 30¼ W. 288 poles to a small beech on the south side of Pile's Branch; thence down said branch N. 68 E. 25 poles 10 links to a beech; N. 69¾ E. 24 poles to a sycamore; N. 72½ E. 31½ poles to a beech; N. 88¾ E.
21 15 poles to a beech; N. 86 E. 31 poles 10 links to a beech; S. 87¼ E. 59 poles 15 links to a beech; S. 86¼ E. 22 poles 3 links to a beech; S. 67½ E. 15 poles 10 links to a gate post by the road; thence up the road S. 13 E. 31½ poles to a stake; thence N. 67½ E. 149 poles to the beginning. Also, the brick house and lot, and the premises attached thereto, hereinbefore reserved in the conveyance to Virginia Brown;

also, the tract of land bounded and described as follows: Beginning at the bridge where the turnpike crosses Tackett's Creek; thence up the left-hand fork of said creek, to the upper end of the cleared land, 58 poles above Beard's house; thence S. 83½ W. 143 poles; N. 54¼ W. 217 poles to Gallitan's back line; and with said line N. 30¼ E. 40 poles to a stake, corner to the tract conveyed above to Virginia Brown; thence with her lines S. 54¼ E. 196 poles to 3 dogwoods and 3 sourwoods, pointers; N. 57 E. 225 poles to a large dead white oak at the point of the ridge between the forks of Tackett's Creek; N. 45¾ E. 29 poles to the turnpike, and with the turnpike to the beginning. Also, a certain other tract of land on Coal River, bounded as follows: Beginning on the bank of Coal River, at the lower end of Russell's (now Simms') 100 acres; thence with two lines of said tract to the original Gallatin line; thence with said line N. 85 W. 354 poles to a beech on Brown's Creek, in the original Gallitan corner; thence N. 30¼ E. 302 poles to a stake; thence S. 66 E. 240 poles; S. 85 E. to a stake on Coal River; thence up
22 the river bank to the place of beginning. Also, a certain other tract of land on Coal River, bounded as follows: Beginning on the bank of Coal River, just above the falls; thence up the river bank to where the road from the turnpike crosses to Coal River; thence with said road to the exterior line near where Barnett lives; thence with three of the exterior lines S. 13 E. 82 poles; S. 52 W. 138 poles to a black oak on the top of a ridge overlooking Coal River; thence S. 80 W. 28 poles to the beginning. Also, all the interest held and owned by the estate of the said William Tompkins, dec'd, in the Steele survey of 27,000 acres, lying between Kelley's Creek and Witcher's Creek, about 500 acres; also a tract of land in the county of ———, in the State of Ohio, which belongs to the estate of the said William Tompkins, dec'd. Also, a lot in the town of Newport, in the State of Kentucky; and the said William H. Tompkins doth covenant and agree to and with the said Rachel M. Tompkins, Beverly Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann and wife, that he has received, in the advancement above made to him, his full share and proportion of the estate of the said William Tompkins, and he doth hereby release any further or other claim at law or in equity to every part or portion of said estate.

23 And this deed further witnesseth that for and in consideration of the premises, and for the further consideration of one dollar to them paid, they, the said Rachel M. Tompkins, Beverly Tompkins, W'm H. Tompkins, John C. Brown and wife, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann and wife, do grant unto the said R. Ellen Tompkins, as and for her share of the estate, the following property, to wit: A certain tract or parcel of land situate in the county of Kanawha, on the west side of the Kanawha River, being a part of the Valcoulon tract, and bounded as follows: Beginning at a stake on the Kanawha River, corner to the above tract conveyed to W'm H. Tompkins; thence S. 85 W. 130 poles to a locust by the road; N. 2¾ E. 17 poles 5 links to a stake by a branch, and up the branch N. 67¼ W. 2 poles 15 links to a beech; N. 50 W. 35 poles 15 links to a beech; N. 37½ W. 19 poles 5 links to a beech; N. 30¾ W. 14 poles to a poplar; N. 47¼ W. 18 poles 20 links to 3 beeches, pointers, on a small point on the forks of a drain, and in the original Gallatin back line; thence with said line, N. 30¼ E. 49 poles to a white oak marked "A. G.," original Gallitan corner; thence with Gallitan's line to its intersection with the line of partition of banks 1,000 acres survey, between John and Samuel Lewis, and with said line to the bank of Scary Creek, and down said creek

24 3 poles from its south edge to the Kanawha River; thence up the river to the beginning. Also, a certain other tract or parcel of land bounded and described as follows: Beginning on the Guyandotte turnpike where the second exterior line of the original John Lewis tract crosses the said turnpike, being 27 poles from a beech on the bank of Tackett's Creek, and corner to Virginia Brown's tract described above; thence S. 10¼ E. 103 poles to a white-oak stump; S. 5 W. 80 poles to a stake; S. 13 E. 118 poles to Coal River road by Barnett's house; thence with said road to the bank of Coal River; thence up the river bank to a stake, lower corner to W'm H. Tompkins' tract conveyed above; thence with two of his lines to the original Gallitan back line; thence with said back line N. 30½ E. to the corner of the tract conveyed to W'm H. Tompkins above, and with his lines S. 54½ E. 217 poles, N. 83¾ E. 143 poles to the upper end of the cleared land, 58 poles above Beard's house, on the main left-hand fork of Tackett's Creek; thence down said fork, with its meanders, to the turnpike bridge across Tackett's Creek; thence with the turnpike to the beginning; also a certain other tract or parcel of land, situate in Fayette County, and State of West Virginia, on the Kanawha River, and west side thereof, being the same tract of land conveyed by Aaron Stockton to the said William Tompkins, by
25 deed bearing date on the 16th day of January, 1851, and of record in Fayette County; also a certain other tract of land containing nine acres more or less, on the Kanawha River, and the east side thereof, above and adjoining the Burning Spring tract, conveyed above to the said Rachel M. Tompkins; and the said Ellen Tompkins doth hereby covenant and agree to and with the said Rachel M. Tompkins, Beverly Tompkins, William H. Tompkins, John C. Brown and wife, Henry P. Tompkins, John G. W. Tompkins, and Thomas B. Swann and wife, that she has received, in the advancements aforesaid, her full share and proportion of the estate of the said W'm Tompkins, dec'd, and she doth hereby release any other or further claim, at law or in equity, to any other part or portion of the said estate.

And whereas the said R. Ellen Tompkins is desirous to secure to herself the use and benefit of the property conveyed to her above, and to make a settlement of the same, in trust, so that in the event of marriage, or of such other contingency as may arise hereafter, the said property may be preserved and secured to her, and to such uses and purposes as she may now direct and appoint:

This deed therefore further witnesseth that, with the intent and
26 for the purposes aforesaid, she, the said R. Ellen Tompkins, doth grant all the property conveyed to her above, in trust, unto Nicholas Fitzhugh; that he, the said N. Fitzhugh, will hold the same for the uses and upon the trusts hereafter declared; that is to say, that he, the said trustee, will suffer and permit the said R. Ellen Tompkins to take, accept, and receive the rents, issues, and profits of said property, to and for her own use, during her natural life; and in the event of the marriage of the said R. Ellen Tompkins, that the said trustee shall hold and retain the said trust during the continuance of said marriage; and if she should die leaving issue, this trust shall continue for the benefit of said child or children until said child or children shall arrive at the age of twenty-one years, and the said property shall then pass to them discharged of said trust; and if the said R. Ellen Tompkins should deem it advisable to sell the property hereby conveyed, she shall apply to some court of record in the county of Kanawha, where the greater part of the property lies, for authority to sell the same, or any part thereof, and if such authority be given, the said trustee is authorized and empowered to sell

the same, in such manner and upon such terms as the court may prescribe, but he shall reinvest the proceeds of said sales in such other property or funds as the court shall direct, and shall hold the same
27 subject to all the terms and provisions of this trust, and the said N. Fitzhugh doth signify his assent to, and his acceptance of, the above trust by his signature to this deed.

And whereas Charles C. Tompkins, one of the children and devisees of the said W'm Tompkins, dec'd, sold and conveyed his entire interest in said estate to his brothers and sisters named above, for the sum of $25,000 00, and in part of said sum, the said parties executed their note or bond to the said Charles for the sum of $11,355 13, and each of the said parties is bound for the one-seventh of the said sum respectively:

It is hereby agreed that one-seventh of the said sum shall remain and be a lien upon each of the respective shares or portions above conveyed, until the said debt is fully paid off and discharged.

Witness the following signatures and seals:

| | |
|---|---|
| R. M. TOMPKINS. | [SEAL.] |
| W'M H. TOMPKINS. | [SEAL.] |
| JNO. C. BROWN. | [SEAL.] |
| A. VIRGINIA BROWN. | [SEAL.] |
| R. ELLEN TOMPKINS. | [SEAL.] |
| HENRY P. TOMPKINS. | [SEAL.] |
| JOHN G. W. TOMPKINS. | [SEAL.] |
| THOMAS B. SWANN. | [SEAL.] |
| MARY SWANN. | [SEAL.] |
| B. TOMPKINS. | [SEAL.] |
| N. FITZHUGH. | [SEAL.] |

Stamp duty paid.

J. H. OLEY, *Col'ct.*

28 COUNTY OF KANAWHA, *to wit:*

I, Hedgeman Slack, a notary public for the county of Kanawha, in the State of West Virginia, do certify that Rachel M. Tompkins, W'm H. Tompkins, John C. Brown, A. Virginia Brown, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, and Nicholas Fitzhugh, whose names are signed to the writing above, bearing date on the 20th day of April, 1867, have acknowledged the same before me in my county aforesaid, and I do further certify that the said A. Virginia Brown, wife of the said John C. Brown, personally appeared before me in my county aforesaid, and being examined by me privily and apart from her said husband, and having the writing aforesaid fully explained to her, she, the said A. Virginia Brown, acknowledged the said writing to be her act, and declared she had willingly executed the same, and does not wish to retract it.

Given under my hand and notarial seal this 22nd day of May, 1867.

[SEAL.] HEDGEMAN SLACK,
*Notary Public.*

COUNTY OF KANAWHA, *to wit:*

I, Hedgeman Slack, a notary public for the county of Kanawha, in the State of West Virginia, do certify that Thomas B. Swann and Mary Swann, whose names are signed to the writing above, bearing
29 date on the 20th day of April, 1867, have acknowledged the same before me in my county aforesaid, and I do further certify that the said Mary Swann, the wife of the said Thomas B. Swann, personally appeared before me in my county aforesaid, and being examined by me

privily and apart from her said husband, and having the writing aforesaid fully explained to her, she, the said Mary Swann, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand and notarial seal this 23rd day of April, 1867.

[SEAL.] HEDGEMAN SLACK,
*Notary Public.*

WEST VIRGINIA, *Kanawha County, set:*

I, Hedgeman Slack, a notary public of the county of Kanawha, in the State of West Virginia, do certify that Beverly Tompkins, whose name is signed to the writing above, bearing date on the 20th day of April, 1867, has acknowledged the same before me at my county aforesaid.

Given under my hand and notarial seal this 24th day of April, 1867.

[SEAL.] HEDGEMAN SLACK,
*Notary Public.*

KANAWHA COUNTY, RECORDER'S OFFICE,
*April 24th*, 1867.

This deed was this day presented in this office, (and the same
30 being a partition deed and no stamp being required,) was thereupon, together with the certificates of acknowledgement thereunto annexed, admitted to record.

Teste:

JNO. SLACK, *Recorder.*

Copy. Teste:

JOHN SLACK, *Recorder.*

EXHIBIT NO. 2.

*Will of W'm Tompkins, dec'd.*

In the name of God, amen. I, William Tompkins, of Kanawha County, Virginia, being of sound mind and memory, but infirm in bodily health, do make this my last will and testament, hereby revoking all others:

1st. I desire that all my just debts shall be paid.

2. I give to my much beloved wife Rachel all my estate of whatsoever kind, to have and to hold the same during her natural life, remainder to our children; and upon these trusts and conditions, that my beloved wife, in whom I have perfect confidence, shall have the sole control of my estate during her life, for her own support and personal expenditure, in such style as she shall think proper to live, and for the purpose of maintaining and educating our children, and starting them in life; and for these purposes she may at all times sell and dispose of any of my personal estate, and purchase other, and make such use and disposition of it as I might during my lifetime.

3rd. It is my desire that she shall make such advancements to the children, from time to time, as she shall think best for them, of
31 lands, money, and slaves, or either, and make and execute any necessary conveyances, but each advancement is to be charged to the child that receives it, so that an equitable and equal division may be made at or after her death among all my children or their heirs, but my wife is not to charge to any of my younger children any of the necessary expenses for their maintainance, or that may be incurred in giving them a good education, until they arrive at the age of twenty-one years.

4th. My wife is requested, whenever she may need the counsel or aid of others in the management of my estate, to call on such of our children as she shall think proper, or such other persons as she shall deem best, and make them reasonable compensation therefor.

5th. I do hereby appoint and make my beloved wife, Rachel, sole executrix of this will, and desire that she may be permitted to qualify without security, and desire she shall have the management and guardianship of all my children who are under the age of twenty-one years.

Witness my hand and seal this 29th April, 1857.

W'M TOMPKINS. [SEAL.]

Signed, sealed, and published by William Tompkins, the testator, as for his last will and testament, in our presence, we all being present at the same time, and called on to witness the same.

C. HEDRICK.
JOHN THOMPSON.
R. E. PUTNEY.

At a circuit court held for Kanawha County the 8th day of June, 1857.

This last will and testament of William Tompkins, deceased, was this day presented in court, and duly proved by the oaths of C. Hedrick and R. E. Putney, subscribing witnesses thereto, and is ordered to be recorded.

Test: A. W. QUARRIER, *Clk.*

A copy. Test: JNO. SLACK, *Recorder.*

*Decree nisi.*

And at the same day, to wit, at rules held in the clerk's office of the district court aforesaid, on the first Monday in the month of March, 1867, the defendants being summoned, and not appearing and answering complainant's bill, on motion of the complainant, by his counsel, the decree nisi was awarded against them.

*Bill taken for confessed, and set for hearing at the rules.*

And at another day, to wit, at rules held in the clerk's office of said court, on the first Monday in the month of April, 1867, the defendants still failing to appear and answer complainant's bill, on motion of the complainant, by his counsel, this cause was set for hearing at the then next term.

*Guardian ad litem appointed.*

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, April 24th, 1867, it appearing to the court from the bill and exhibits filed in this cause that the def't, John G. W. Tompkins, is an infant under the age of 21 years, it was ordered that Thomas B. Swann, esq., be appointed his guardian ad litem, to assert, protect, and defend his interests in this suit.

And on the same day, to wit, at a district court of the United States for the district of West Virginia, held as aforesaid, on the 24th day of April, 1867, this cause came on to be heard on the bill and exhibits, and

the said bill taken for confessed, and set for hearing at the rules as to all the defendants, and was argued by counsel, upon mature con-
33 sideration of all of which it is adjudged, ordered, and decreed that this cause be referred to Alexander T. Laidley, who is hereby appointed a special commissioner for that purpose, to take, state, and report the following accounts:

1st. What real estate the defendant Beverly Tompkins owns or is entitled to in this judicial district.

2nd. What liens exist upon said real estate; whether by trust deed, judgement, mortgage, or otherwise, and the several priorities of said liens.

3rd. What advancements have been made to the said Beverly by the executrix of William Tompkins, dec'd, by virtue of the will of said decedent; the date of said advancements; the character of the said advancements; whether in money, slaves, or lands.

4th. Whether said Beverly has drawn more than an eighth part of the personal estate of which W'm Tompkins died possessed.

5th. Whether the rents of the real estate owned by the said defendant Beverly Tompkins will discharge said liens within five years.

6th. And such other and further accounts as any party to this suit may require.

And leave was granted to any of the parties defendants in this cause to file their joint or separate answers to the bill at any
34 time before the 1st June next with the clerk of this court. And Commissioner Laidley was instructed not to commence the taking of this account before said 1st day of June, 1867, and notice of the time and place of taking this account published for four successive weeks in some newspaper published in Kanawha County, shall be deemed equivalent to personal service of the same.

And at another day, to wit, at a district court held as aforesaid, on 26th day of November, 1867, the defendant Rachel M. Tompkins this day filed her answer in this cause, to which the complainant replied generally. (Said answer is in the words and figures following, to wit:)

*Answer of R. M. Tompkins.*

The separate answer of Rachel M. Tompkins to the bill of complaint filed in the district court of the United States for West Virginia, by Alfred A. Thornton, against herself and others.

To the Honorable John J. Jackson, judge of said court:

The defendant Rachel M. Tompkins, executrix of W'm Tompkins, dec'd, reserving to herself the benefit of all exceptions by way of demurrer or otherwise to the may errors, both of law and fact, in said bill contained, for answer thereto, or to so much thereof as she is advised
35 it is material for her to make answer to, says, that it is true this defendant is the widow, one of the devisees, and executrix of W'm Tompkins, dec'd, late of the county of Kanawha, in the State of West Virginia; that previous to his death the said W'm Tompkins published a last will and testament, which after his death was duly admitted to probate; that this defendant qualified as executrix under said last will, and that the copy of the same filed by complainant with his bill is a true copy. It is also true that Beverly Tompkins, one of the defendants, is one of the children of her marriage, and is also named as one of the legatees and devisees in said will. This defendant knows nothing of the

judgement against said Beverly, set up by compl't in his said bill, and never heard of the same until some time after a final adjustment and settlement with him and his co-heirs and devisees, made on or about the 20th of April, 1867. The said Beverly is the oldest child of her marriage, married early in life, and had been receiving large and frequent advances from her as executrix, commencing soon after the death of her husband. It is true that these advances were made in personal property and money, but the will of her husband expressly authorizes and directs the executrix "shall make such advancements to the children from time to time, as she shall think best for them, in land, money, and slaves, or
36 either, &c., &c." Under this direction of her said husband, whose wishes it was, and is, her most cherished desire to carry out, she made the advances aforesaid to her son Beverly, as his necessities required, and in such kinds of property as suited the condition of the estate, and the said legatee and devisee Beverly. This defendant is advised that no one had a right to question either the character or amount of these advances. It seemed desirable to all the legatees and devisees, as well as entirely the desire of this defendant, that as the youngest child would soon attain his majority, an adjustment of all advances and a division of the property should take place. Accordingly, the settlement took place, as before stated, in April, 1867. It had been ascertained by a settlement made with said Beverly in the previous December, that the amounts advanced to said Beverly during the period aforesaid was $17,000 at the least. This amount was agreed to and acknowledged in a partition deed between all parties, the said Beverly included, dated 20th April, 1867, and now of record in the recorder office of Kanawha County. This defendant distinctly avers that said amount of advancements was just and correct, and actually made, and rightly chargeable to said Beverly, under the provisions of his father's will, in the estimate of the estate made, and charging him with the advancement,
37 it left him entitled to the 300 acres of land which was conveyed to him by the deed aforesaid, and which made his part of the estate, in the opinion of all concerned, and by the express agreement of said Beverly, fully equal to the share of any other one.

This defendant further says that no suggestion or notice of any kind was ever served upon her, founded upon the judgement of complainant against said Beverly, except the summons in this suit, and denies that she ever had any actual notice of the same, until after the adjustment of April, 1867, and having fully answers, prays hence to be dismissed with her costs.

RACHEL M. TOMPKINS,
*Exex. &c., by her counsel.*

WEST VIRGINIA, *Kanawha County, to wit:*

This day personally appeared Rachel M. Tompkins, the defendant in the annexed answer, before the undersigned & made oath that the facts stated in said answer are true, as she verily believes.

Given under my hand this 26th day of Nov., 1867.

GEORGE RITTER,
*Justice of Charleston Township.*

38 And at another day, to wit: The 25th day of November, 1867, came Alexander T. Laidley, special commissioner in this cause, and filed a special report, (which report is in the words and figures following, to wit:)

*Special report of A. T. Laidley, sp'l comm'r.*

In the U. S. dist. court for the district of West Virginia, at Charleston.

ALFRED A. THORNTON
*vs.*
BEVERLY TOMPKINS & OTHERS. } In chancery.

To the Hon. John J. Jackson, judge of said court:

The report of the undersigned respectfully shews that in pursuance of the provisions of the decree rendered in this cause at the last April term of your court, I gave notice to the parties to the said suit that on the day of , 1867, I would proceed at my office to take, state, and report the accounts ordered in said decree. I annex a copy of the printed notice marked "A." That on the 2nd day of September, 1867, at the instance of the complainant's counsel, I addressed to Mrs. Rachel M. Tompkins, a defendant in said suit, a letter calling for certain vouchers in her possession, and received a reply thereto, which will be found appended to said letter. I refer to this letter and her answer in the paper marked ("B.") Your commissioner further shews that on the 22nd day of October, 1867, I addressed to Mrs. Tompkins a notice fixing a peremptly day for the production of such vouchers as she might have, and caused her to be served with a copy of that notice. I refer the court to this notice, with the officer's return thereon, in the paper marked "C."

39 And your commissioner reports that such vouchers were not filed before me on the day so fixed, nor have they been filed since, and I further report that I have been unable, from the failure of Mrs. Tompkins to file these vouchers, to make the report directed by said decree.

Respectfully,

ALEX'R T. LAIDLEY,
*Sp'l Comm'r.*

CHARLESTON, *Nov. 25th*, 1869.

The exhibits referred to in the foregoing report are in the words and figures following, to wit:

EXHIBIT B.

CHARLESTON, *Sept.* 2, 1867.

Mrs. TOMPKINS, MY DEAR MADAM: Under a decree of the U. S. court, I am directed to take several accounts in a suit of Thornton against your son Beverly, and will thank you to furnish me statements shewing what advancements have been made by you to him under the will of his father, the date of such advancements, and whether in money, slaves, or lands; also whether Beverly has drawn more than 8th part of the personal estate left by his father. I will esteem it a favor if you will furnish me this information at your earliest convenience.

Very respectfully,

ALEX'R T. LAIDLEY.

Mr. A. T. LAIDLEY: I refer you to the deed of partition between myself and the heirs of William Tompkins, dec'd, for an answer to
40 the above enquiry. The deed shews the am't secured by Beverly Tompkins in the way of advancement, and his acknowledgement of the same.

R. M. TOMPKINS.

EXHIBIT C.

In the United States court for the district of West Virginia, held at Charleston.

ALFRED A. THORNTON
*vs.*
BEVERLY TOMPKINS AND OTHERS. } In chancery.

COMMISSIONER'S OFFICE,
*October 22nd*, 1867.

To Mrs. Rachel M. Tompkins, a defendant in the said suit:

The account directed in this cause cannot be made up without the production of certain vouchers in your hands, shewing payments made to the defendant, Beverly Tompkins, by way of advancement of his father's estate. I am therefore required to ask that you will lay before me all such vouchers as you may have in your possession, or under your control. And I fix Thursday, the 7th day of November, 1867, as the day, and my office in Charleston as the place, when and where you will be pleased to furnish me with such papers as vouchers. The original or certified copies thereof will be returned to you, if you require it. And I am instructed to advise you, that on your failure to comply with this order, you will be reported to the court for a contempt in not obeying its order.

I am, very respectfully, &c.,

ALEX'R T. LAIDLEY, *Comm'r.*

*Return of Sheriff.*

Served Oct. 30th, 1867, as to Mrs. Rachel M. Tompkins, by delivering to her a copy of the within notice.

B. F. WYATT, *Dep.*
For J. W. SENTZ, *S. K. C.*

41 And at another day, to wit: At rules held in the district court aforesaid, on the first Monday in the month of December, 1867, came again the complainant by his counsel and filed his amended bill of complaint in this cause, which bill is in the words and figures following, to wit:

*Amended bill.*

To the Hon. John J. Jackson, jr., judge of the United States district court for the district of West Virginia, held at Charleston:

Your orator, Alfred A. Thornton, alleges, by way of supplement and amendment to his original bill filed in said cause against Beverly Tompkins & others, that he instituted his original suit on the 27th February, 1867; that he filed his bill at the March rules, 1867; and that afterwards, and in consequence of said suit, and in order to delay, hinder, and defraud your orator, on the 20th day of April, 1867, the defendants, Rachel M. Tompkins, William H. Tompkins, John C. Brown, A. Virginia Brown, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, Thomas B. Swann, and Mary Swann, and Beverly Tompkins, heirs and devisees of William Tompkins, deceased, made and executed a deed of partition among themselves, by which they divided and partitioned all the real and personal estate which was devised by the late William Tompkins, dec'd. An office copy of said deed is herewith filed

and made part of this bill, marked A. (See said partition deed, heretofore copied and made part of this record.)

42 By an examination of this deed it will be seen that Beverly Tompkins, after the filing of your orator's original bill, acknowledges to have received from the executrix of W'm Tompkins, dec'd, the sum of $17,000, by way of advancement under the will of his father, and that there is conveyed to him by the executrix and other devisees three hundred acres of land in Burning Spring Hollow, part of the Steele survey of 27,000 acres, and this conveyance, together with the alleged advancements aforesaid, the said Tompkins acknowledges to be his full share of his father's estate; and by said deed the said Beverly acquits and relinquishes to the executrix and other devisees all claim to either the real or personal estate of his deceased father. Your orator alleges that it is very doubtful whether the devisees of William Tompkins are the owners of three hundred acres of land in the Steele survey, situate in the Burning Spring Hollow, and if there be that quantity of land, that the same is mountainous and barren, and of little value. And it will be seen by an inspection of an agreement executed by William Tompkins, A. Donnally, and others, a copy of which is herewith filed as Exhibit X, the devisees of William Tompkins are only entitled to one-half of the coal and mineral in said tract of land, and that some $3.\frac{00}{100}$ per acre would be a large price for the said land, making the estimate value thereof, say $900, which, being added to the amount acknowledged to have been received therefor by said Beverly, whould make his share of his father's estate $17,900. Your orator, however, denies that

43 said Beverly ever received said sum of $17,000, or one-half of that sum, and he now repeats his demand for the vouchers for said advancements, which the executrix has heretofore refused to file either in answer to the original bill or with the commissioner. In fact, as your orator alleges, the said Beverly has drawn no more money from the estate than the defendant William, and but little more than the other devisees.

Your honor will observe that ample provision is made in the deed of partition for Sarah Thompson, wife of the said Beverly, and her children, by way of gratuity. There is conveyed to Henry P. Tompkins, as their trustee, a large and commodious brick dwelling-house, one of the finest country residences on the Kanawha River, together with a large and valuable farm of bottom land, with adjacent wood-lands, out-houses, &c.

And, as your orator will be able to prove, the lands assigned to the said Sarah and her children constitute in value exactly one-seventh part of the real estate of which William Tompkins died seized, and precisely the quantity and value of land that Beverly Tompkins would have been entitled to had he not been largely indebted, and had he been in a situation to hold real estate. In other words, as your orator charges, the lands which should have been conveyed to Beverly Tompkins, and out of which your orator and the other creditors should have obtained satisfaction for their debts, has been conveyed to Sarah Tompkins and her children, for the purpose of hindering, delaying, and defrauding the creditors of said Beverly. Ample evidences of this fraud are to

44 be found on the face of the deed of partition, and the cotemporaneous papers.

1st. There are eight children and devisees of W'm Tompkins, dec'd, the seven heretofore named, and Charles C. Tompkins. On 3rd day of July, 1866, Charles C. Tompkins sold and conveyed his interest in his father's estate to his mother and his seven brothers and sisters, in-

cluding the said Beverly, as will fully appear by reference to the agreement of the parties and the deed of said Charles, copies of which are herewith filed, marked exhibits "B" and "C." It will be seen, by reference to the agreement which was made anterior to the bringing of this suit, and before the condition of said Beverly was known to the executrix, the other devisees, or himself, and when there was no motive either to over-value or under-value, that one-eighth part of the estate of W'm Tompkins was valued at $25,000 by the executrix and devisees, while after the institution of this suit, and in consequence thereof, the one-seventh part of the same estate is valued by the same parties at $17,900, making a difference of $7,100, a sum about sufficient to pay off the debts of said Beverly.

2nd. It is obvious that at the date of the agreement of 3rd July, 1866, the executrix and devisees of William Tompkins did not regard the def't, Beverly Tompkins, as insolvent, nor as having withdrawn his full share of the estate; otherwise they would never have permitted him to have become the partner and co-contractor in the purchase of the interest of Charles C. Tompkins.

3rd. The bill was filed at the March rules, 1867. The partition and settlement on Sarah Thompkins were made directly thereafter, (20th April, 1867,) for the purpose of placing the interest of said Beverly in
45 said estate out of the reach of his creditors, and for the further purpose of obtaining his receipt for $17,000, erroneously alleged to have been paid him.

4th. The estate settled upon Sarah Tompkins and children is the one-seventh part of the whole estate of W'm Tompkins, dec'd, being the portion that Beverly takes under the will and the purchase from Charles.

5th. The share or portion settled upon the said Sarah Tompkins is charged by the deed of partition in the event of a deficiency of personal assets, with Beverly's share (one-seventh) of the remaining debts due from the estate of W'm Tompkins, and with one-seventh of the sum contracted to be paid to Charles C. Tompkins by his brothers and sisters. The settlement then presents this double aspect as far as general creditors are concerned: the real estate is regarded as the property of Sarah and her children; as far as the family creditors are concerned, it is still the property of Beverly, and liable to his debts and contracts. This provision demonstrates that the settlement was not made out of the es tate of the other devisees, but it is the portion or share of Beverly, upon which the other devisees have retained a lien.

6th. So much of the deed of partition as converts the life-estate of Rachel M. Tompkins in the real and personal estate of William Tompkins into an absolute estate in all the remaining personal estate, and in the valuable salt property, farm, and dwelling-house conveyed to her, is void, so far as the docketed judgment of your orator is concerned.
46 Your orator therefore repeats the allegation that the settlement upon Sarah Tompkins is fraudulent and void, and that the estate settled upon her is the estate of Beverly Tompkins, and that the same is liable to the lien of your orator's judgment.

Your orator further alleges that there is a large and valuable portion of the real estate of W'm Tompkins, which is not included in said partition, of which Beverly is entitled to the one-seventh part, and which is also liable to the lien of your orator's judgment. Attention is called to that portion of the deed which conveys to William Tompkins "all the interest held and owned by the estate of the said William Tompkins, deceased, in the Steele survey of 27,000 acres, lying between Kelly's Creek and Witche's Creek, about 500 acres." This clause in the deed

would only pass to the said William 500 acres, and the devisees are entitled to some 2,300 acres, leaving 1,700 acres to be divided among the seven heirs, and Beverly's share subject to the lien of your orator's judgment.

Your orator prays that all the parties to the original bill be required to answer this amended and supplemental bill; that Charles C. Tompkins be also made a party, and Henry P. Tompkins be also, in his character of trustee for Sarah Tompkins, be made a party defendant; that the infant children of Beverly and Sarah Tompkins be made parties defendants, to wit, Lena Tompkins, William Tompkins, jr., Caroline Tompkins, Clarence Tompkins, and Charles C. Tompkins, jr.; that Oliver A. Patton, who has intermarried with R. Ellen Tompkins, and has been substituted as her trustee, in room and stead of Nicholas Fitz-
47 hugh, be also made a party def't; that they answer the bill and amended bill; that Rachel M. Tompkins be required to settle her accounts as administratrix; that she show what advances she has made as executrix to each of the devisees, the date of each advancement, what species of property or money the advancement was made in, the receipt of each devisee for each advancement, and the original charge or entry on her account for the same, and that she file vouchers for the same; that she declare upon her corporal oath whether she has advanced to Beverly Tompkins the sum of $17,000; that your honor set aside the whole partition deed between the devisees of William Tompkins, or, if deemed more proper, set aside the settlement made upon Sarah Tompkins; that your honor subject the interest of Beverly Tompkins in his father's estate, whether settled upon his wife and children, or upon himself, to the lien of your orator's judgment; and that your honor grant your orator such other further and general relief as equity and good conscience require.

ALFRED A. THORNTON,
*By Counsel.*

QUANIER, *Sol.*

The exhibits referred to in the foregoing amended bill is in the words and figures following, to wit:

EXHIBIT X.—*Tompkins, Donnally, and others—Agreement.*

This indenture, made and entered into the 25th day of March, in the year of Christ one thousand eight hundred and twenty, between William Tompkins, John Reynolds, and Andrew Donnally, jr., of the
48 county of Kanawha, and State of Virginia, and William Steele, of the county of Woodford, and State of Kentucky.

Whereas the said William Tompkins hath heretofore purchased from John Marshall and Mary Willis his wife, George Fisher and Anne his wife, Daniel Call and Lucy Willis his wife, and Elizabeth Jaqueline Carrington, one equal third part of twenty-seven thousand acres of land, (more or less,) granted by the Commonwealth to John Steele, by patent bearing date the 8th day of November, 1796, situated, lying, and being in the county of Kanawha, between Elk River and Kelly's Creek, beginning at a sugar tree and red oak on the bank of Elk River, and opposite Magazine Branch, and about one mile up Elk River from its mouth, as by the said patent, and the deed of conveyance from said Marshall and others to the said Tompkins; reference being thereto had will more fully and at large appear. And whereas the said Tompkins hath likewise purchased from Archibald Blair, of the city of Richmond, and

one other equal third part of the same tract of land, of twenty-seven thousand acres, above recited, and hath sold parts of the two-thirds of the tract aforesaid to said Andrew Donnally, jr., and John Reynolds; and whereas, also, the above-named William Steele now is owner of the other third part of the tract of land aforesaid, now this indenture witnesseth, that the said William Steele, John Reynolds, Andrew Donnally, jr., and Williams Tompkins, (who are now owners of the whole of said land,) bind themselves, their heirs, and assigns, to make, and they do hereby make, the following partition of said tract of land, to wit: the said Tompkins and Steele are to have, and to themselves and
49 their heirs forever, free from the claims of said Donnally & Reynolds, all the land in said tract which lies above the top of the dividing ridge between the Burning Spring Creek and Simmon's Creek, and with a line running parallel, and the top of said ridge to the back part of the said survey, said Reynolds and Tompkins are to have and to hold to themselves and their heirs forever, free from the claims of the said Steele and Donnally, all the land and timber in said tract which lies between the top of said dividing ridge last above mentioned and a line running parallel thereto, as before set out, and the top of the dividing ridge which lies in the point between the Kanauha River and George's Creek, which last mentioned ridge lies below the Burning Spring Creek; they are, also, to have all the land and timber on the top and last mentioned ridge, but not to extend down the lower side of said ridge, nor to take any timber therefrom; they are, further, to have all the land and timber on the Burning Spring Creek, and all its branches, yet, with this exception, that said Donnally and Steele are to have and to hold to themselves, and their heirs and assigns, one equal half of all the stone-coal and stone-coal banks, which are now, or may be hereafter discovered on the land hereinbefore laid off and conveyed to said Reynolds and Tompkins; and they, the said Steele and Donnally, their heirs and assigns, are also to have the privilege of a road from any such coal bank, to convey the coal to any place they may desire on the Kanawha River, they using the same road which may be used by said
50 Reynolds and Tompkins, their heirs and assigns, for the same purpose; yet, notwithstanding, if the said Tompkins and Reynolds, nor those who hold under them, should not have nor use any road for the conveyance of said coal, said Steele and Donnally have the privilege of making and using a road for the purpose last above mentioned; and said Steele and Donnally are to have and to hold to themselves and their heirs forever, free from the claims of said Reynolds and Tompkins, all the balance of said tract of land and timber with the exception of those parts hereinbefore specified; but the said Tompkins and Reynolds are to have and to hold for themselves and their heirs forever all the right, title, and interest, which said Steele now has in and to a salt well and three acres of land, on which said well is sunk, ajoining the land of Eli Jarrett, being the land and salt well which the said Steele purchased from a certain John Warth, and which was jointly held and owned by said Steele and Eli Jarrett, until said Jarrett sold his interest in and to the said lands and salt well to the Kanawha Salt Company; and said Steele hereby conveys and confirms to said Tompkins and Reynolds, and their heirs forever, all his right, title, and interest in and to said three acres of land and salt well; and, further, said Donnally and Steele are to have and to hold to themselves, and their heirs and assigns, free from the claims of the said Reynolds and Tompkins, the salt well opposite the Company Store, together with the nineteen acres of land (more or less) which said Steele formerly purchased of David and Tobias Ruff-

ner, together with all and singular the appurtenances belonging to
51 said nineteen acres of land and salt well; and the said Tompkins and Reynolds hereby release any claim which they may have to said last-mentioned land and salt well, and their appurtenances. And, further, the said Tompkins and Reynolds covenant and agree, and bind themselves to divide, and they do hereby divide and agree, and bind themselves to divide, and they do hereby divide the land which is hereinbefore set out and laid off for their joint portion below the top of the dividing ridge, between the Burning Spring Creek and Simmon's Creek, as follows, to wit: said Reynolds is to have and to hold to himself, and his heirs and assigns forever, free from the claims of said Tompkins, all the land and timber on and about the first right-hand fork of the Burning Spring Creek and its branches, up to the land hereinbefore laid off to said Steele and Tompkins jointly, and all the land and timber from the said first right-hand fork of the Burning Spring Creek to the top of the dividing ridge which lies between the first and second right-hand forks of the Burning Spring Creek; and said Tompkins is to have and to hold, free from the claims of said Reynolds, all the balance of the land and timber hereinbefore laid off for himself and said Reynolds jointly, within the said tract of twenty-seven thousand acres of land; that is, the balance of that portion of land which is laid out for their part below the dividing ridge between the Burning Spring Creek and Simmon's Creek, agreeably to the metes and abuttals hereinbefore described; and each of the parties to these presents hereby conveys and confirms to the others, respectively, all and singular the portions
52 of land as it is hereinbefore laid off and mutually divided amongst them. And it is hereby further disputated, agreed, and covenanted by and between the parties, that all former divisions of said land between them, and all agreements and writings in relation to such division, and all deeds of conveyance from said Tompkins, for any part of said land, to either of the aforesaid parties, are hereby entirely done away, and null and void. And this partition and division of said tract of land, with the conditions hereinabove stated, are to stand valid alone, this being a mutual agreement amongst themselves with a view to queting all disturbances which might result from a partition; and whereas, also, the purchase of the two-thirds of said tract of land was made from said Archibald Blair and John Marshall and others, as above recited by said Tompkins, who executed his individual bonds to the said alienors for the amount of the purchase money of said land, with an understanding that the said Donnally and Reynolds should pay their respective portions of said purchase money, as it was stipulated between them that each was to have a part of the land.

Now, this indenture further witnesseth, that each of the parties, to wit, said Tompkins, Reynolds, & Donnally, have paid their respective parts of all the instalments which have as yet become due, and that there yet remains of said purchase money, unpaid to Archibald Blair, the sum of six thousand and sixty-six dollars and sixty-six cents, one-half of which will become due and payable to the said Blair on the 20th day of October, 1820, and the other half on the 20th day of Octo-
53 ber, 1821, which said two instalments last mentioned are to be paid and discharged as they become due by the said Tompkins, Reynolds, and Donnally jointly; that is, one-third part of the said sum of money by each of them; there is also of said purchase money yet unpaid to John Marshall and others, the sum of four thousand dollars, which is also payable in two equal instalments, on the 20th October, 1820, and the 20th of October, 1821; one-third of which said four

thousand dollars is to be paid as it becomes due by said Donnally, and the remaining two-thirds by said Tompkins; and as said Tompkins hath executed a trust deed to secure to the alienors of said land the price thereof, as the same becomes due and payable, if said Donnally and Reynolds, or either of them, should fail to pay their respective parts of said purchase money, as they are herein bound to pay them, and by reason of such failure the land, or any part thereof, should be sold by virtue of said trust deed, to pay the part of the money which they herein covenant and agree to pay said Tompkins, is in no manner whatever to be accountable to them for the land which may be sold under the trust deed aforesaid; and said Tompkins further covenants and binds himself to make to said Reynolds and Donnally deeds of conveyance, the land, which is laid off in this agreement for the respective parts, as follows: As he has already procured a deed from John Marshall and others, for one equal third part of said land, he is to convey by the same kind of a deed which he procured from said Marshall the land to said Reynolds and Donnally, which is herein laid off for
54 them, so far as his right will enable him to do so, by virtue of said deed, when he procures from Archibald Blair a deed for the remaining third part of said land, he is to convey to them, said Reynolds and Donnally, the balance of the land within their respective limits so far as his third part extends, by the same kind of a deed which he is to get from the said Blair under his contract with him for the purchase of said land, reference being had to said contract. The deed for the land purchased from said Marshall and others, as is before specified, is to be made by said Tompkins to said Reynolds and Donnally when they shall require him to do so, and all and every of the parties herein forever bind themselves to confirm every clause and stipulation contained in the foregoing indenture. But it is distinctly understood and agreed between the parties that the road above spoken of, which said Donnally and Steele are to have from any stone coal banks which may be found on the land hereinbefore laid off for said Tompkins and Reynolds, is not to be taken through their land, but is to run either with the line which divides the land of said Tompkins and Reynolds, or with the line dividing the land of said Tompkins from the land of those who hold immediately below him or the line dividing the land of said Reynolds from the land of those who hold immediately above him in said survey, so as not to run the road through the middle of their land, but on the boundary thereof. And it is further stipulated and agreed by and between the parties aforesaid, that said William Steele shall and will, for him-
55 self and the heirs and devisees of John Steele, deceased, convey all their several rights in and to the salt well and lot of land above spoken of, adjoining the land of Eli Janett, and the timber attached to the same, to said Tompkins and Reynolds, their heirs and assigns forever, and by way of explanation, as the said William Steele holds the land which is hereinbefore stated to belong entirely to himself jointly with some others, who are the heirs and devisees of John Steele, deceased, the said William Steele therefore covenants and agrees that he will sign and seal this indenture for the said heirs of John Steele, as well as for himself, and the said William Steele binds himself to guarantee and confirm all the divisions and covenants hereinbefore made, as well for his coheirs or devisees in said land as for himself, and he, as their agent, undertakes and agrees that all the covenants and agreements hereinbefore contained shall be ratified and confirmed with them. It is also understood and agreed by and between all the parties to these presents, that the present partition of said land is not to bar any claims

which any of the parties may have on the other for waste heretofore committed on, for using more of the timber that they were by law entitled to, or for any illegal trespass committed on said land.

In testimony whereof, the parties hereto have set their hands and affixed their seals the day and year first above written.

WILLIAM TOMPKINS, [SEAL.]
JOHN REYNOLDS, [SEAL.]
56 ANDREW DONNALLY, [SEAL.]
WILLIAM STEEL, [SEAL.]
ROBERT STEELE, &
JERRY ALEXANDER,
By WILLIAM STEELE, *Agent.*

Signed, sealed, & delivered in presence of—

KANAWHA COUNTY COURT, CLERK'S OFFICE,
*8th August*, 1820.

This article of agreement was this day presented for record and acknowledged by William Steele for himself and as agent for Robert Steele and Jerry Alexander, and by Andrew Donnally, and continued for further acknowledgment, and on the 26th of May, 1821, the same was acknowledged by William Tompkins, and on the 8th of September, 1821, it was also acknowledged by John Reynolds, and accordingly admitted to record.

Teste: A. W. QUARRIER, *D. C. K. C. C.*

EXHIBIT "B."

*Agreement between C. C. Tompkins and R. M. Tompkins & others.*

Memorandum of an agreement made and entered into between Charles C. Tompkins of the one part, and Rachel M. Tompkins, his mother, William H. Tompkins, Beverly Tompkins, Thomas B. Swann, John C. Brown, R. Ellen Tompkins, Henry P. Tompkins, and John G. W. Tompkins, of the second part.

Whereas the said Charles C. Tompkins is anxious and desirous to realize and sell out his entire interest and estate, as devised by him in his father's estate from the will of William Tompkins, deceased, admitted to probate on the 8th June, 1857, in the circuit court of the county of Kanawha, whether such estate is devised by him, or now held by him in possession, remainder, or reversion; and whereas at his earnest solicitation the parties of the second part, his mother, brothers, sisters,
57 and brothers-in-law, have agreed to purchase the same upon the terms following:

Now this agreement witnesses, that in consideration of the said Charles C. Tompkins making and executing a deed and transfer of his entire estate, interest, right, and title in and to his father's estate, as held and derived by him by his said father's said will aforesaid, and which deed so made by him bears date on this 3rd day of July, 1866, they, the said parties of the second part, in their several capacities of executrix, devisees, children, and heirs-at law of said William Tompkins, deceased, do agree to pay to him the sum of twenty-five thousand dollars, as follows: To execute, deliver, and acknowledge for record a good and sufficient grant or deed for the Hudson farm, conveyed to William Tompkins by Jesse and William W. Hudson, on 16th day of February, 1852, estimated at this sale at ($5,000) five thousand dollars; to assign

and transfer to him, the said C. C. Tompkins, a judgment lien against Joal Early, obtained in the circuit court of Putnam County in favor of R. M. Tompkins, executrix, for $2,000, with interest from 24th day of April, 1856, and costs, $7 50c.; to surrender up to him to be cancelled, and held as paid, a debt due from said C. C. Tompkins to William H. Tompkins for the sum of $1,182 94c., principal and interest included to the present time; to surrender to him, and consider as paid and settled and cancelled, the sum of ($4,231 10c.) four thousand two hundred and thirty-one dollars and ten cents, it being the amount advanced to the said C. C. Tompkins by said Rachel M. Tompkins, executrix of said W'm Tompkins, dec'd, under the provisions and in accordance
58 with the will aforesaid, and to make up the full amount of said $25,000 aforesaid; the consideration to execute their, the said parties of the second part, bond for the sum of eleven thousand three hundred and fifty-five dollars and thirteen cents, ($11,355 13c.,) payable in four years after this date to the said C. C. Tompkins or order, the said sum of $25,000, constituted and composed of the items and sums above-named, being received by said C. C. Tompkins in full satisfaction and as full consideration for his interest and estate under his father's will as sold, granted, transferred, assigned, and delivered by the deed aforesaid of himself and wife to the parties of the second part hereto, and bearing date 3rd July, 1866. And the said parties of the second part hereby agree with the said C. C. Tompkins that they will indemnify and save him harmless from all loss by reason of John G. W. Tompkins, who is a party to these agreements, deeds, and transactions, being a minor at the date of their execution, and they further bind themselves to the extent of any damage that said Charles C. Tompkins may sustain for any default therein to procure the said John G. W. Tompkins' full and complete satisfaction of said deeds, contracts, and transactions as hereinbefore set out, so soon as he shall arrive at full age.

In witness of all which the parties have hereunto set their hands and seals this third day of July, 1866.

CHARLES C. TOMPKINS. [SEAL.]
R. M. TOMPKINS, Ex. [SEAL.]
W'M H. TOMPKINS. [SEAL.]
B. TOMPKINS. [SEAL.]
T. B. SWANN. [SEAL.]
59 JOHN C. BROWN. [SEAL.]
R. ELLEN TOMPKINS. [SEAL.]
H. P. TOMPKINS. [SEAL.]
JOHN G. W. TOMPKINS. [SEAL.]

STATE OF WEST VA., *Kanawha Co., ss:*

I, J. M. Garland, a notary public in and for the county and State aforesaid, do hereby certify that Charles C. Tompkins, Rachel M. Tompkins, William H. Tompkins, Beverly Tompkins, Thomas B. Swann, John C. Brown, R. Ellen Tompkins, Henry P. Tompkins, and John G. W. Tompkins, whose names are signed to the foregoing writing, bearing date July 3rd, 1866, have acknowledged the same before me in my county aforesaid.

Given under my hand this 11th day of July, 1866.

J. M. GARLAND,
*Notary Public.*

KANAWHA COUNTY RECORDER'S OFFICE,
11*th July*, 1866.

This agreement was this presented in this office together with the certificate thereon endorsed, and, the same being duly stamped, was thereupon admitted to record.

Teste: JNO. SLACK, *Rec'r.*

EXHIBIT "C."

*C. C. Tompkins & wife to R. M. Tompkins & others—Deed.*

This deed made and entered into on this 3rd day of July, in the year eighteen hundred and sixty-six, between Charles C. Tompkins, and Emeline J. Tompkins, his wife, of the first part, and Rachel M. Tompkins, William H. Tompkins, Beverly Tompkins, John C. Brown, Thomas B. Swann, Ellen R. Tompkins, Henry Preston Tompkins, and
60 John G. W. Tompkins, of the second part, witnesses, that the said parties of the first part, in consideration of the sum of twenty-five thousand dollars in hand, paid them by the said parties of the second part, do by these presents grant and convey to the said parties of the second part all the interest, right, title, and estate in and to all or any of the lands and real estate of which the late William Tompkins, dec'd, of Kanawha County, died seized or possessed, or was entitled to either equitable at law in remainder or reversion, and wherever the same may lay or be found, whether in this county or the State of West Virginia or elsewhere, with all the appurtenances, privileges, and rights thereunto belonging. And the said parties of the first part, for the consideration aforesaid, the receipt whereof is hereby further acknowledged, do further grant, convey, transfer, and assign all interest, right, title, estate at law or in equity, in possession or existing, as choses in action to which they are now entitled, or may hereafter be entitled, to any personal estate or mixed estate under the will of the said William Tompkins, deceased, it being the intention of the parties of the first part hereby to grant, convey, transfer, assign, and surrender to the parties of the second part, for the consideration aforesaid, all their right, title, estate, and interest vested in them, the said parties of the first part, or either of them, by the will aforesaid of William Tompkins, deceased, dated on the 29th April, 1857, and admitted to probate in the circuit court of said county of Kanawha, on the 8th day of June, 1857, reference being thereto
61 had. The said parties of the second part to have and to hold the property hereinbefore granted, conveyed, and transferred, whether real, personal, or mixed, to their and each of them in the same manner, to the same extent, and the same rights and estates as they now hold or are possessed of the other interests in said property, under the will of the said William Tompkins, dec'd, aforesaid.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

CHA'S C. TOMPKINS. [SEAL.]
EMELINE J. TOMPKINS. [SEAL.]

STATE OF WEST VA., *Kanawha Co., ss:*

I, J. M. Garland, a notary public in and for the county and State aforesaid, do hereby certify Charles C. Thompson, whose name is signed to the foregoing deed, bearing date the 3rd day of July, 1866, has acknowledged the same before me in my county aforesaid. I further certify that Emeline J. Tompkins, wife of the said Charles C. Tompkins,

whose names are signed to the writing above, bearing date July 3rd, 1866, personally appeared before me in the county aforesaid, and being examined by me privily and apart from her husband, and having the writing fully explained to her, she, the said Emeline J. Tompkins, acknowledged the same writing to be her act, and declared she had willingly executed the same, and does not wish to retract it.

Given under my hand this 11th day of July, 1866.

J. M. GARLAND,
*Notary Public.*

62 KANAWHA COUNTY RECORDER'S OFFICE, 11*th July*, 1866.

This deed was this day presented in this office, together with the certificate of acknowledgment thereon endorsed, and the same being properly stamped, as required by law, was thereupon admitted to record.

Teste:

JNO. SLACK, *Rec'r.*

63 And at another day, to-wit, the 19th day of December, 1867, came the complainant, by his counsel, and sued out of the clerk's office of said district court and alias summons in chancery to answer the original and amended bills filed in this cause, which writ, with the return of the marshal thereon endorsed, is in the words and figures following, to-wit:

*Alias summons in ch'y.*

The President of the United States of America to the marshal of the district of West Virginia, greeting:

You are hereby commanded to summon Beverly Tompkins and Sarah, his wife, Wm. H. Tompkins, John G. W. Tompkins, H. P. Tompkins, Thomas B. Swann and Mary, his wife, John C. Brown and Virginia, his wife, Ellen R. Patton, Rachel M. Tompkins, in her own right and as executrix of William Tompkins, Charles C. Tompkins, Oliver A. Patton, trustee for Ellen R. Patton, Lena Tompkins, William Tompkins, Caroline Tompkins, Clarence Tompkins, and Charles C. Tompkins, jr., infant children of Sarah Tompkins, and H. P. Tompkins, trustee, citizens and inhabitants of the State of West Virginia, and of the judicial district thereof, if they be found in your district, to appear before the judge of the district court of the United States for the said district, at children, at rules to be held in the clerk's office of our said court on the first Monday in February next, to answer a bill and
64 amended bill in chancery exhibited against them in said court by Alfred A. Thornton, a citizen and inhabitant of the State of Kentucky; and have then and there this writ.

Witness: The Hon. John J. Jackson, jr., judge of the said court, at Charleston, this 19th day of December, anno Domini 1867, and in the 92nd year of the independence of the United States.

[SEAL.] JASPER Y. MOORE,
*Clerk U. S. D. C., D. W. Va.*

*Return of marshal.*

Executed the within summons on the 11th day of Jan'y, 1868, on Rachel M. Tompkins, by delivering her a copy thereof, and on same day executed on H. P. Tompkins, in his own right and as trustee, and on J. G. W. Tompkins, by delivering to Mrs. R. M. Tompkins, (their mother,) at their usual place of abode, a copy for each of them, (3 copies,) after

explaining the purport thereof to her, she being a free white person over the age of 16 years, and a member of their family, the said H. P. and J. G. W. Tompkins not being found at their usual place of abode; and on the 16th of Jan'y, 1868, executed on J. B. Swann and Mary, his wife, and on John C. Brown and Virginia, his wife, by delivering to said J. B. Swann and John C. Brown each an office copy thereof, and on W. H. Tompkins on same day, by delivering a copy thereof to Mrs. —— Tompkins, his wife, at his usual place of abode, after explaining the purport thereof to her, she being a free white person over the
65 age of 16 years, and a member of his family, he, the said W. H. Tompkins, not being found at his usual place of abode; and on the 22nd day of January, 1868, served on Beverly Tompkins, by delivering a copy thereof, and served on the infant children of Sarah Tompkins on same day, by delivering copies thereof to Beverly Tompkins.

H. F. AULTZ, *D.*, for
E. M. NORTON, *U. S. M. D. W. V.*

*Decree nisi on amended bill.*

And at another day, to wit, at rules held in said district court on the first Monday in the month of February, 1868, the defendants being summoned and failing to appear and answer complainant's amended bill, on motion of the complainant, by his counsel, it was ordered that the decree nisi be entered against them.

*Amended bill taken for confessed & set for hearing at the rules.*

And at another day, to wit, at rules held in said district court on the first Monday in the month of March, 1869, the defendants still failing to appear and answer complainant's amended, on motion of complainant, by his counsel, it was ordered that said bill be taken for confessed and set for hearing at the then next term.

And at another day, to wit, at a district court held as aforesaid on the 23rd day of April, 1868, Rachel M. Tompkins tendered her answer to the amended bill filed in this cause; and the defendants, T. B. Swann and Beverly Tompkins, respectively tendered their separate answers to the bill and amended bill, all of which are ordered to be filed, and the complainant replied generally to the said answers. (Said answers are in the words and figures following, to wit:)

*Answer of R. M. Tompkins.*

The separate answer of Rachel M. Tompkins to the amended bill of Alfred A. Thornton, filed in the district court of the United States for the district of West Virginia, against this defendant and others.

To the Hon. John J. Jackson, judge of the said court:

This respondent, saving all just and legal exceptions to the said
66 amended bill, for answer thereto, or to so much thereof as she is advised it is material for her to answer, saith that she denies that the partition and settlement of the estate of the late William Tompkins, as contained in the deed of the 20th of April, 1867, (Exhibit A, filed with the said amended bill,) were made for the purpose or with the object of hindering, delaying, or defrauding the complainant or any other creditors of her co-defendant, Beverly Tompkins; indeed, neither

the said compl't nor any other creditor of the said Beverly, nor any debt due from him was thought of, or estimated, or considered as a reason for making the said partition, but the same was made for the reason stated in the answer of this def't to the original bill, and for the further reason that R. Ellen Tompkins, one of the heirs and devisees of the said William Tompkins, dec'd, was about to consumate a marriage with Oliver R. Patton, and it was deemed advisable by her friends that her property should be secured to her in anticipation of that event.

Respondent also denies that the said settlement and partition were made in consequence of the institution or pendency of this present suit. The insinuation made by compl't that the said Beverly Tompkins, after the filing of the original bill, acknowledged to have received from the executrix of William Tompkins, dec'd, the sum of $17,000 by way of advancement, so far as it seeks to give a fraudulent or unfair as-
67 pect to the transaction is untrue in fact, because the advancements had been made long before that time, and the acknowledgement of the same had also been made before the suit was brought. The averments in the deed which the compl't criticises is only the assertion of a fact existing before that time; and if he intends to base an argument of fraud thereon he has signally failed.

Respondent avers that the said Beverly Tompkins had received previous to the 1st day of January, 1867, by way of advancement from the estate of his father, the said sum of $17,000 00 or more, and that the amount received by him as aforesaid, together with the property conveyed to him in said deed, was and is his full share and interest in said estate; and she is advised that the said Beverly, being under no disabilities or restraints, had a right to receive said advancements, and to give his receipts and acknowledgements for the same; and further, that the said deed of the 20th of April, 1867, which contains his personal acknowledgement and receipt of said advancements and his release of all further claims in said estate, is binding not only on him, but on all other persons, unless the same shall be successfully impeached for fraud; and this has not and cannot be done.

Respondent asserts that so far as she is advised and believes, there are at least 300 acres of land in the Burning Spring Hollow, as
68 assigned in said deed to Beverly Tompkins; that that was the quantity always claimed by the said William Tompkins in his lifetime, and that the same is valuable coal land, and worth, as respondent believes, at least $10 per acre, at which price it was taken by the said Beverly, in the partition aforesaid; this, with the $17,000 before referred to, would make the said Beverly's share in his father's estate about $20,000 00 instead of $17,900, as stated in the bill. Respondent would state that, in her opinion, the shares in said estate were not worth more than from $17,000 to $20,000. Indeed, judging from sales that have been made of a portion of the property of one of the heirs, and the prices realized therefrom, since the date of said deed, the interest of the other heirs will not amount to more than from $15,000 to $17,000. This is the case with regard to recent sales made of the property of R. Ellen Patton, and her share is by no means the least valuable interest. Respondent therefore feels justified in saying that the said Beverly received in the settlement, including the advancements aforesaid, his full share in his father's estate, or more.

Respondent also denies that her co-def't, William H. Tompkins, or any of the other heirs and devisees, have drawn or have received anything from said estate beyond what they are charged with in said deed; and the charge in the bill to the contrary is untrue. An

69 argument or inference is drawn by the compl't from the fact that a provision was made in said deed of partition for Sarah Tompkins, the wife of the said Beverly, and her children "by way of gratuity." The covert sneer concealed under this allegation is hardly sufficient to maintain a charge of fraud. It is true that the brothers and sisters of the said Beverly did, "by way of gratuity," give a portion of their property to his wife and helpless children, for their support; but this, it seems, ought not to receive very severe censure. If the gift equals one-seventh of the estate, it may establish the liberality of the donors, but does not prove fraud.

It is further argued by the compl't that the deed of partition is fraudulent because C. C. Tompkins, one of the heirs and devisees of William Tompkins, sold his interest in the estate for $25,000; to which respondent replies, that this may be evidence of a good bargain made by the said C. C. Tompkins, but does not establish fraud. The fact, if it exists, may prove that he got more for his interest than it was worth; or that he was a better trader than those with whom he negotiated. But from what has been before stated, and which is here again asserted, the interests in said estate were not worth more than from $17,000 to $20,000, and the said Charles did not get more for his. He sold his interest nominally for $25,000, but in reality for less than $20,000, as will be seen from the following statement: The payments to him were a farm on the Kanawha River, estimated at $5,000, which has 70 since been sold for $3,000, (a loss of $2,000;) a judgement on Joab Early, (supposed then to be doubtful,) on which he realized about $3,000; $1,200 due from him to William H. Tompkins settled in this transaction; $4,000 of advancements made to him, also settled; and a note for about $11,350, for the balance, at four years without interest, which, with interest off, would net $8,626; realizing $19,831. Besides at that time there was a large debt on John P. Hale, secured by what was regarded a sufficient deed of trust for about $18,000 due the estate, which was afterwards settled at $8,000, creating a deficiency from this source of $10,000.

2d. It is further argued, that when the other parties bought out Charles C. Tompkins, they did not regard Beverly as insolvent, nor as having withdrawn his full share of the estate, because he was a co-contractor in the purchase of said interest, to which it may be replied that an insolvent man, and one who has got all that he is entitled to from an estate, may be a contractor alone, or a co-contractor with others, for a large or a small amount; but that experience shews that his ability to pay does not always depend on his willingness to contract. Nor does the argument exactly touch the question whether he may or may not have got all that is his, from other sources.

3d. It is further argued, that the bill was filed at March rules, 71, 1867, and the settlement was made on Sarah Tompkins on the 20th of April, 1867, for the purpose of obtaining Beverly Tompkins' receipt, and placing his property out of his hands. To which resp't replies that the main facts upon which this argument is based being false, the argument is worthless.

4th. It is further argued, that the said Sarah Tompkins and her children get, under said settlement, one-seventh of the whole estate, "being the portion that Beverly takes under the will and the purchase from Charles." This argument has been already answered, by refering it to the generosity of the donors, rather than a design to commit a fraud on the compl't by disposing of their property, as they thought proper.

5th. It is further argued, that the property settled on the said Sarah

and her children is charged with one-seventh of any deficiency in the personal assets, to pay the debts of the estate, and one-seventh of the amount due to the said Charles. To this respondent replies, that it is not unusual in making a gift to encumber it with some burden or lien; and the mere fact that the donors, when they gave, "by way of gratuity," "one-seventh of the estate," should encumber it with one-seventh of the debts of the estate, is not so material as to "demonstrate" that the settlement was not made out of the shares of the other devises. Indeed, this would seem to be just and fair and equitable; and doubtless the gratuity was highly acceptable to the said Sarah and her
72 children, although it was incumbered with this provision.

6th. It is further argued, that so much of the deed as converts the life estate of this respondent in the entire property into an absolute estate in a part of it is void. To this respondent replies, that under the will of her husband she had a vested estate for life in the entire property; how far that provision gave her the absolute property in all the personalty, being an intricate question of law, she will not undertake to decide. But she will say that she is advised that all the devisees sui juris did convey to her, for and on account of her conveyance to them of a valuable estate, (to wit, he life estate aforesaid,) a portion of the estate in absolute fee. She submits that so far as any of the property is conveyed in fee to her, she is a purchaser for full and valuable consideration, and that the consideration which she paid, (her life estate in the whole,) was worth more than she got, (the fee in a part.) The compl't alledges that there is a large interest in the Steele survey of 27,000 acres, not conveyed to William H. Tompkins, which is liable to his judgement. The facts in reference to that conveyance are simply these: It was at that time a question of doubt how large an interest was held by the estate in said survey, and the parties had been informed by skillful counsel, who had investigated the subject, that there was only
73 about 500 acres belonging to the estate between "Kelly's Creek and Witcher's Creek." Acting under this impression and advice, that land was offered to other of the heirs at 500 acres and declined by them; and finally it was taken by the said William H. Tompkins at a hazzard, with the understanding that if the quantity was more he should have the benefit of the excess; if it was less, he should stand the loss. Accordingly, when the quantity was ascertained, in a partition suit between the owners of the "Steele survey," to be more than five hundred acres, the other parties, in order to quiet any doubt that might arrise as to the title of the said William to the whole, and to carry out the contract in good faith, executed a deed to him therefor, reciting the above facts, (a copy of which is herewith filed as Exhibit 1.) Besides, among other portions of the estate conveyed to the said William H. Tompkins, was a lot of land in the State of Ohio, taken by him also at a hazzard, which has been wholly lost to him; but this respondent avers that it was the full purpose and intention of all the parties to the deed of partition to allot to the said William "all the interest held" by them in the Steele survey, "between Kelly's Creek and Witcher's Creek."

Respondent, further answering, saith that she is advised that the compl't has no right in this court, or elsewhere, to call for a settle-
74 ment of her account as executrix of the estate of William Tompkins, dec'd; that he has no right to require of this respondent to shew the dates of each advancement made by her, or what species of property or money the advancements were made in; or to demand of her a production of the receipt for said advancements, nor the original charge or entry

on her account for the same; nor to call for the filing of the vouchers therefor. She insists that Beverly Tompkins, being of sound mind and lawful age, and acting under no duress or constraint for her, had the right to acknowledge the existance of certain facts to which this respondent & he were parties; that he has made that acknowledgement in the usual form, by deed under his hand and seal; and that complainant has no right to go behind that deed, upon a loose suspicion or charge of fraud, without some evidence to sustain his allegation, in the face of the absolute and unqualified denial of this respondent of all fraud or bad faith. But respondent, proceeding, notwithstanding her protest above, to answer the demands made by the compl't, (for she has no desire to conceal or misrepresent,) saith: that there were three settlements made by her with the said Beverly Tompkins for and on account of advancements made to him, out of the estate of his father, which are herewith filed, marked Exhibits 2, 3, & 4. The first
75 settlement was made on the 29th day of January, 1858, and shows a balance of $900 due from the said Beverly; the second was made on the 18th day of March, 1861, and shows a balance against him of $5,042 03c.; and the third was made on the 31st day of December, 1866, and shows a balance against him of $18,138 62c., which last sum, 18,138 62, is the true amount which the said Beverly had received by way of advancement up to that time, and with which he was justly chargeable in the division and partition of the estate, instead of the sum of $17,000. Lest the comp't might imagine fraud in the apparent discrepancy between the sum of $17,000 expressed in the partition deed as received by said Beverly, and the same shews in Exhibit No. 4 $18,138 62, respondent begs leave to offer one word of explanation. The attorney who drew the said deed did not have the settlement of the 31st of December, 1866, before him, and was informed that the amount of advancements was about $17,000, and hence the discrepancy. But complainant avers that the said Beverly has received out of the estate, by way of advancement, the said sum of $18,138 62, subject to a credit of $265 54, and interest thereon.

And having then fully answered, respondent prays to be hence dismissed, &c.

RACHEL M. TOMPKINS,
*By Counsel.*

76 This day Rachel M. Tompkins came before me, a justice in and for the county of Kanawha, in the State of West Virginia, and made oath in due form of law, that the above answer is true, as she verily believes.

Given under my hand this 22nd day of April, 1868.

JNO. A. TRUSLOW,
*Justice Charleston Township.*

The exhibits referred to in the foregoing answer are in the words and figures following, to wit:

EXHIBIT No. 1.

This deed, made the 9th day of October, 1867, between Rachel M. Tompkins, widow and executrix of William Tompkins, deceased, and Beverly Tompkins, John C. Brown and Virginia his wife, Thomas B. Swann and Mary his wife, Oliver A. Patton and R. Ellen his wife, H. P. Tompkins, and John G. W. Tompkins, heirs-at-law and devisees of the said William Tompkins, of the one part, and William H. Tompkins, of the other part.

Whereas, by a deed of partition bearing date on the 20th day of April, 1867, and recorded in Kanawha County, between the parties herein above named, there was conveyed to the said William H. Tompkins (among other things, as his separate property) all the interest held and owned by the estate of the said William Tompkins, dec'd, in the Steele survey of 27,000 acres, lying between Kelly's Creek and Witcher's Creek.

77 And whereas a suit for division and partition of the said survey, or of that part thereof which embraces the land assigned and conveyed to the said William H. Tompkins, as aforesaid, is now pending in the circuit court of Kanawha, and the commissioners have in part completed their work of making said division and partition, and have allotted or purpose to allot to the estate of the said William Tompkins, dec'd, as his share or interest in the upper division of said Steele survey, one lot lying between Kelly's Creek and Witcher's Creek, which is clearly embraced in the partition deed aforesaid between the heirs and devisees of the said William Tompkins; also another lot of 467 acres or thereabout, lying on Campbell's Creek, and opposite or nearly opposite to Witcher's Creek; and some doubt may arrise whether the said last mentioned lot may strictly fall within the bounds prescribed in the partition deed aforesaid:

Now, therefor, this deed witnesseth that it was the purpose and intention to convey to the said William H. Tompkins, in the said deed of partition, all the land held and owned by the estate of the said William Tompkins deceased, lying in what is known as the upper division of the said Steele survey of 27,000 acres; and that the said lot on Campbell's Creek lies within the said upper division of the Steele survey; and the said parties of the first part hereby release to the said William

78 H. Tompkins all right, title, claim, or interest that they have, if any, in and to the same lot on Campbell's Creek.

Witness the following signatures and seals:

| | |
|---|---|
| R. M. TOMPKINS. | [SEAL.] |
| B. TOMPKINS. | [SEAL.] |
| JOHN C. BROWN. | [SEAL.] |
| A. VIRGINIA BROWN. | [SEAL.] |
| T. B. SWANN. | [SEAL.] |
| MARY SWANN. | [SEAL.] |
| H. P. TOMPKINS. | [SEAL.] |
| JOHN G. W. TOMPKINS. | [SEAL.] |
| OLIVER A. PATTON. | [SEAL.] |
| R. ELLEN PATTON. | [SEAL.] |

STATE OF WEST VIRGINIA,
*County of Kanawha, to wit:*

I, Hedgeman Slack, a notary public for the county of Kanawha, in the State of West Virginia, do certify that Oliver A. Patton and R. Ellen Patton, whose names are signed to the writing above, bearing date on the 29th day of October, 1867, have acknowledged the same before me in my county aforesaid; and I further certify that R. Ellen Patton, the wife of the said Oliver A. Patton, appeared before me in the county aforesaid, and being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said R. Ellen Patton, acknowledged the said writing to ber

79 act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this 29th day of October, 1867.

HEDGEMAN SLACK,
*Notary Public.*

STATE OF WEST VIRGINIA,
*County of Kanawha, to wit:*

I, John A. Truslow, a justice of the county of Kanawha, in the State of West Va., do certify that R. M. Tompkins, B. Tompkins, J. C. Brown, A. Virginia Brown, T. B. Swann, Mary Swann, H. P. Tompkins, and J. G. W. Tompkins, whose names are signed to the writing above, bearing date on the 29th October, 1867, have acknowledged the same before me in my county aforesaid; and I do further certify that A. Virginia Brown, the wife of the said J. C. Brown, and Mary Swann, the wife of the said T. B. Swann, personally appeared before me in the county aforesaid, and being examined by me privily and apart from their said husbands, and having the writing aforesaid fully explained to them, they, the said A. Virginia Brown and Mary Swann, acknowledge the said writing to be their act and deed, and declared that they had willingly executed the same, and did not wish to retract it.

Given under my hand this 20th day of December, 1867.

JNO. A. TRUSLOW,
*J. P. for Charleston Township.*

KANAWHA COUNTY, RECORDER'S OFFICE,
*December 21st*, 1867.

This agreement was this day presented to me in this office, and,
80 together with the certificates thereon endorsed, is admitted to record.

Teste: G. H. PORTER, D.,
For JNO. SLACK, *Recorder.*

A copy—teste: JNO. SLACK, *Recorder.*

EXHIBIT NO. 2.

1867. *Mrs. R. M. Tompkins in ac. with B. Tompkins.*

| | | |
|---|---|---|
| March. | To expence feeding and driving cattle to Cedar Grove in March, 1857 | $31 95 |
| | To Parsons' bill fencing 184 pannels fence, *a* 10c | 18 40 |
| | " Dr. Putney's not. 260, by discount *a* 1½ %, 37 37, | 222 63 |
| | To H. H. Wood's ac., hay gave you | 43 83 |
| | " N. Stanley's do | 21 23 |
| | " order T. A. Lewis, for this amount | 40 00 |
| | " paid freight bills steamer Hurricane | 5 40 |
| | " " Geo. Yukle, building cabin, 30; McClurry f. chimney | 40 00 |
| | " " S. B. Wilson, bill grading road and garden, | 36 00 |
| | " 165 lbs. bacon hams sent you at 11⅔ | 27 50 |
| | " p'd Wood f't on flour sundries, p'r bills | 15 78 |
| | " Sam. Moses, am't of pa's note | 181 00 |
| | " p'd McCargar for trees | 72 00 |
| | " 1 bar. flour sent you | 6 50 |
| | " p'd Sheriff Simms, execution for barrels | 72 85 |
| | " " Sheppard for stable, p'r contract | 250 00 |
| | " " " " lumber for same | 44 00 |
| 81 | To p'd J. Hughes, lumber for same | 36 00 |
| | " " Hayward bill in Gallipolis | 40 00 |
| | " cash gave R. D. Clarke to go to Gall's | 15 00 |
| | " p'd T. & Higginbotham note to Shelton | 80 40 |

| | |
|---|---|
| To p'd bill blinds ch'd to Mayes | 63 00 |
| " cash gave you this day | 77 92 |
| " note given to balance ac. to date | 900 00 |
| | $2,341 39 |

Settled this 29th day of January, 1858, and the above shows correct statement of our accounts to date.

R. M. TOMPKINS.

1857. *Mrs. R. M. Tompkins to B. Tompkins.*

| | |
|---|---|
| By cash of Noyes' boys for corn | $150 00 |
| " check for this amount | 600 00 |
| " cash of Pyles | 100 00 |
| " " Higginbotham | 223 68 |
| " bill charged on Thompson's ac. | 110 00 |
| " hire Thena, 6 months | 25 00 |
| " " to 12 months | 100 00 |
| " rent of farm for 1857 | 450 00 |
| " am't B. S. Thompson's order | 265 54 |
| " " Pyle's order | 317 17 |
| | 2,341 39 |

R. M. TOMPKINS.

EXHIBIT No. 3.

1858. *Beverly Tompkins ac. with R. M. Tompkins, Ex.*

| | | | | |
|---|---|---|---|---|
| May | 20. | To 520 lbs. meal, 1¼; June 19th, 225 lbs. do. | 9 87 | |
| Sept. | 29. | " 27 bu's wheat | 27 | |
| | | | | $36 87 |
| 82 | | | | |
| 1859. | | | | |
| April | 9. | To 3 bbls., 25c.; 6½ bu. corn, 87½ | 6 | |
| " | 27. | " B. S. Thompson, your order | 265 54 | |
| Dec. | 3. | " cash, 200 00 | 200 00 | |
| | | | | $471 54 |
| 1860. | | | | |
| Jan'y | 18. | To p'd Vickers am't of your note | 1,118 85 | |
| July | —. | " cash in Charleston, 25 00; cash of E. Simms, 15 | 40 | |
| October | 12. | " " 300 00; p'd T. A. Lewis your order, 88 | 388 | |
| Dec. | 13. | " p'd C. S. Pyles for you | 301 17 | |
| " | 21. | " " b'k at P't P't, in your note, | 350 | |
| " | 31. | " rent of place, Jan., 1858, '59, '60, *a* 450 | 1,350 | |
| " | " | " cash of S. Benedict | 60 70 | |
| " | " | " " in '59, 25 00 | 25 | |
| | | | | $3,633 72 |

| | | | | | |
|---|---|---|---|---|---|
| 1861. | | | | | |
| March | 15. | To your note & int. to R. M. T., ex., & T. A. L., Jan. exe'n | 65 25 | | |
| " | " | " 11½ " " " Jan. | 127 | | |
| " | " | " note of 29th Jan., '58, 900, int. to date, 168 75 | 1,068 75 | | |
| " | " | " am't " proceeds of oats sold in Cincinnati | 22 35 | | |
| " | " | " " collected of Nick Aybourn, | 35 | | |
| " | " | " 77 bu. wheat in '60–1 | 77 | | |
| " | " | " 91 lbs. bacon, 10c.; bill goods at C. F. Macken, 6 58 | 15 68 | | |
| " | " | " 2 p'r shoes, 1 50; 40½ y'ds cotton, 10½; ½ lb. tho., 50 | 7 75 | | |
| " | " | " 3 y'ds jeans, 75c.; lining, 13 | 2 38 | | |
| " | " | " hire of Joe, Jan., 1858 | 125 | | |
| " | " | " " " " " 4 mo's in '60 | 41 66 | $1,587 | 82 |
| | | | $85,729 95 | $85,729 | 95 |
| 83 | | | | | |
| 1858. | | | | | |
| July | 9. | By 165 lbs. coffee, 15c.; bbl., 25; 222 lbs. sugar, 8 | 44 52 | | |
| " | " | " goods, 2 87; J. & J. Seashoal's note, 14 13 | 17 | | |
| " | " | " cash, 3; 1 wagon, 80 | 83 | | |
| 1861. | | | | | |
| March | 15. | " order on Capt. Thompson & acc'pt, 300; int. to date, 56 25 | 356 25 | | |
| " | " | " 1 corn crusher, 50 00 | 50 | | |
| " | " | " bill of hay to G. P. Bunkenshaw's | 26 35 | | |
| " | " | " " " " " A. P. Fry | 26 80 | | |
| " | " | " cash, 75 00; bill of hay to R. E. Putney, 9 | 84 | | |
| " | " | " note to ballance all ac. to date | 5,042 63 | | |
| | | | | $85,729 | 95 |

Balanced to Mar. 18, 1861.

R. M. TOMPKINS.

EXHIBIT No. 4.

*B. Tompkins to R. M. Tompkins, ex.,* DR.

| | | | | |
|---|---|---|---|---|
| 1861. | | | | |
| March | 18. | To p'd Langley & Kinkead, bill bacon | $81 | 77 |
| | | Interest on same to Dec'r 31st, 1866 | 36 | 79 |
| " | 21. | To 1 bbl. flour, $6; (May 4,) 1 bbl. flour, $6. | 12 | |
| May | 4. | " 6¼ lb. coffee, *a* 20c; to 10 lbs. sugar, *a* 12½ | 2 | 55 |
| July | 16. | " 1 bull, 50$; Dec'r, to 200 lb. bacon, *a* 16⅔. | 83 | 33 |
| 1862. | | | | |
| 1865. | | " negro man, Jo., gave you last spring | 1,000 | |
| May | 15. | " bill goods purchased at Cannelton, | 17 | |
| Sept. | 1. | " this am't p'd Baber for negro hire in 1861 | 73 | 20 |
| | | " interest on same to Dec'r 31st, 1866 | 5 | 85 |
| " | 30. | " this am't paid you by Jno. Burdett | 150 | |
| | | " interest on same to Dec'r 31st, 1866 | 11 | 25 |

| | | | | |
|---|---|---|---|---|
| 1866. | | | | |
| March | 15. | To this am't p'd sheriff's execution in favor of Pt. Pt. Bank | 388 | 60 |
| | | " int. to 31st Dec'r, 1866 | 19 | 16 |
| July | 14. | " this am't p'd J. M. Laidley, 208 61; int., 31st Dec'r, 1866 | 214 | 34 |
| | | " " " " N. B. Cabell your note | 495 | 04 |
| | | " int. to 31st Dec'r, 1866 | 21 | 51 |
| 84 July | 14. | " cash p'd Smith & Knight on y'r ac. fees, | 5 | 00 |
| " | 15. | " this am't p'd C. L. Thompson for you | 220 | 45 |
| | | Interest to 31st, 1866 | 6 | 60 |
| Dec'r | 31. | " this am't y'r note, due 15th March, 1861. | 5,042 | 03 |
| | | Int. to 31st December, 1866 | 1,752 | 10 |
| " | " | " am't note R. Dillion, with interest to 31st Dec., '66 | 52 | 29 |
| " | " | " sundries, including proceeds sales produce left in your hands for sale | 1,060 | |
| " | " | To this am't due R. M. Tompkins for rent of place, as per contract dated 15th March, 1861, and this day settled in full | 7,387 | 76 |
| | | | $18,138 | 62 |

We have this day settled all ac's in full to date as above.

B. TOMPKINS.
R. M. TOMPKINS, *Ex.*

CEDAR GROVE, *Dec'r 31st*, 1866.

*Answer of Thomas B. Swann.*

The separate answer of T. B. Swan to a bill of complaint filed against him & als., and an amended bill filed against him & others by A. A. Thornton, in the district court of the United States for the district of West Va.

Respondent answers and says that he knows nothing of the indebtedness of his co-def't, Beverly Tompkins, to compl't, except what appears from the copies filed with the bill. The will of Mr. William Tompkins will explain itself, and is believed to be an easy subject
85 of judicial construction. The power with which Mrs. Tompkins, the executrix, was clothed under the will are simple and plain. The will was spread upon record, and by it the world was fully informed that Mrs. Tompkins had full power to make to her children such advancements in lands, money, or slaves as she pleased, so that she made all equal in the end. The will determined the rights of Mrs. Tompkins and the children; and any dealings of *of* the world with the children were not paramount, but were subject to Mrs. Tompkins' right first had to administer the estate. The equity courts were always open to creditors of any particular child, and Mrs. Tompkins could have been enjoined from making further advancements to that child, or the creditors might have obtained monies by suggestion. Compl't had no right to dictate to Mrs. Tompkins in what she would make advancements to any particular child. After having advanced Beverly in money, rents, slaves, &c., to nearly his entire interest in the estate, the executrix had no power then to advance him further in lands to the predjudice of the rights of the other children. Resp. coms now to notice the amended bill.

Compl't is an own uncle to Mrs. Beverly Tompkins. He is a gentleman in every sense of the term. It does not now appear that Mr. Thornton ever saw the amended blil. Resp. presumes he never has seen it. Its inordinate epithets never originated with him, and was unlike him. It is not believed that any member of the family, in
86 making the division of the property, was influenced by the pendency of this suit, nor do they take into account the effect that the division would have upon the claims of compl't against his co-deft, B. Tompkins. It was thought that Beverly Tompkins had nearly exhausted his interest in the estate, and there was an annuity at the expense of the rest of the family and out of their property and at their loss to make a provision for the large and helpless family of said Beverly. It was done. The said Beverly, with the lands conveyed to him in the partition deed, had received his full and entire interest in the estate, and the other members of the family thought that they had right to dispose of the rest of the estate, which remained to them, as they pleased. The estate was large enough to give a competency to all the other children, and to enable them to provide for the family of an unfortunate brother. An event not noticed in the bills was the cause of the division being made at the time it was. Miss Ellen Tompkins was about to consummate marriage with Col. O. A. Patton, of Louisville, and for several months the family had been anxious for the estate to be divided before that event. At last the marriage was put off some fourteen days, until some surveying was done necessary for the division of the property. The deed of division was admitted to record 24th of April, and the marriage took place on the 30th of April thereafter. The court will see that Mr. Nicholas Fitzhugh was appointed trustee to this interest in the estate, a fact from which the court may infer that
87 it was not without reasons, at least satisfactory to themselves, that the family wished the estate divided before the marriage. The family thought they had a right to divide their own property without appealing to the courts of the county. They found that a resort to the courts for that purpose would lead to unpleasantness. It was traditional in the family that Mr. Tompkins wished the estate divided without a resort to the courts of the county, and he clothed Mrs. Tompkins with ample power to effect this end. It was his own. He had a right to dispose of it upon his own terms and in his own way, and to give his executrix whatever power he pleased. It betrays a mind in appreciation of the pure and better feelings of our nature to stigmatize an act of generosity upon the part of a family to the family of one of its unfortunate members as an act of fraud. People do not make acts of fraud to their own injury. When it was stated that the other children had received advancements from the estate nearly equal to those received by Beverly Tompkins, the allegations in this were false, and with all his boasted offers of proof, he has not attempted to produce any. The purchase from Charles Tompkins, so severely critisised—and it is admitted that the draftsman is a critic—was made under these circumstances. He had married in Eastern Va. His wife had inherited property to which they were anxious to move. He offered his interest in his father's estate for sale. The family were so fearful that some
88 speculator would purchase it, and give them trouble in dividing the estate to suit their tastes, that they were driven, under this state of facts, to give to Charles Tompkins, for his interest in the estate, more than they thought it worth; but, in doing this, he was willing to, and did, account for large sums of money spent by him at college, with which he was not regarded as properly chargable under the will; and

as a further part of the $25,000, he took the bond of the rest of the family for some $11,400, at 4 years, without interest, and a farm near Coal for $5,000, which was sold since at public sale for his use, at $3,005, partly on time. And since then, but before the 20th of April, 1867, the estate lost several large debts, which were then regarded as good. One debt of some $18,000, on Dr. J. P. Hale, of Kanawha, between these two periods, was compromised at 8,000; and also, between these periods, other large debts in Kentucky and West Va. were lost to the estate.

For years after Mr. Tompkins' death, many large debts, thought to be good, were allowed to remain uncollected, and when the effort was made they were partly or wholly lost. It was intended and it is believed the true construction of the division deed excepted the part conveyed to Mrs. Tompkins from all charge and liability. She did not retain more than was necessary for her comfort, and it is believed her life estate would exceed the amount retained by her in the division
89 deed. Resp. wholly denies that the division deed contemplated anything unfair to any creditor of Bev. Tompkins; at the same time the family did not feel themselves called upon to pay his debts.

T. B. SWANN.

To the Honorable J. J. JACKSON,
*Judge of D. C. of U. S. for D. of W. Va.*

WEST VA., *Kanawha:*

T. B. Swann came to-day before me and made oath that the facts set forth in the foregoing answer are true.

JNO. A. TRUSLOW,
*Justice Charleston Township.*

APRIL 22ND, 1868.

*Answer of B. Tompkins.*

The saparate answer of Beverly Tompkins to the bill of complaint and amended bill, filed in the district court of the United States for the dist. of West Virg'a, against this resp. and others, by A. Thornton.

To the Hon. John J. Jackson, judge of the said court:

This respondent, saving, &c., for answer to the said bill and amended bill, or to so much thereof as he is advised it is material for him to answer, says that he has seen and read the answer filed by Rachel M. Tompkins in this suit, and that he adopts the said answer and each and all of the averments, statements, and denials therein contained, so far as the same refer to the matters and business between this
90 resp't and the said Rachel M. Tompkins, as and for his answer in this case. Resp't here admits that he had received prior to the 31st day of December, 1866, more than $17,000 from the said Rachel, by way of advancement from the estate of his father, William Tompkins, dec'd; and further, that there were three several settlements between this resp't and the said Rachel, prior to the institution of compl't suit, which are correctly described and set out in the said Rachel's answer; and that the amounts found due from him in said settlements were regarded and admitted by him to be advancements from the estate aforesaid. Resp't denies that there was any fraud on his part in the execution of the partition deed of the 20th of April, 1867. Indeed, so far as he was concerned, he regarded himself as having very little interest, personally, in the matter, having received the

whole, or nearly the whole, of his interest in the estate long before that time. Respondent declares that the property conveyed in said deed to his wife and children was not and is not claimed by him, directly or indirectly, as his right or property, but was given to his wife and children as a gratuity and gift.

And having thus answered, he prays to be hence dismissed.

B. TOMPKINS.

Subscribed and sworn to before me the 23rd day of April, 1868.

H. C. McWHORTER,
*Deputy Clk U. S. D. C. D. of W. Va.*

91 And at another day, to wit, at a district court held as aforesaid the 24th day of April, 1868, ordered that Samuel A. Miller, esq'r, be, and he is hereby appointed, guardian ad litem, to answer and make defence for the infant defendants Lena Tompkins, William Tompkins, r., Caroline Tompkins, Clarence Tompkins, and Charles C. Tompkins, r., children of the defendants Beverly Tompkins and Sarah Tompkins.

And thereupon the defendants H. P. Tompkins and J. G. W. Tompkins tendered their joint answer to the bill and amended bill in this cause, which is allowed to be filed, and to which the complainant replied generally. (Said answer is in the words and figures following, to wit:)

*Answer of H. P. Tompkins & J. G. W. Tompkins.*

nswer of H. P. Tompkins and J. G. W. Tompkins to the bill nded bill of Alfred A. Thornton, filed in the district court of ed States for the district of West Virginia, against these nts and others.

. John J. Jackson, judge of said court:

spondents, saving, &c., for answer to the said bill and amended at they have seen and read the answers filed by their mother ndant, Rachel M. Tompkins, in this suit, and they adopt the said answers, and all the statements, allegations, and averments thereof, so far as the same are applicable to these respondents, as and for their answer in this case.

92 Respondents further say, and each of them saith, that they have not, nor hath either of them, ever received anything from the estate of their father, William Tompkins, deceased, with which they, or either of them, are chargeable under his will, save and except the property conveyed to them in the deed of partition of the 20th of April, 1867.

Respondents further state that the property settled on the wife and children of the defendant Beverly Tompkins was a gift and gratuity on the part of the brothers and sisters of the said Beverly.

Respondents deny that there was any fraud or purpose to delay, hinder, or defraud the complainant or any other creditor or creditors of the said Beverly Tompkins, in the settlement and partition of the 20th of April, 1867, nor was the same made with reference to the claim of complainant, or any other debt due from the said Beverly.

And having thus fully answered, they pray to be hence dismissed, &c.

J. G. W. TOMPKINS.
H. P. TOMPKINS.

Sworn to before me in my office this 23rd day of April, 1868.
Teste:

JNO. SLACK, *Clk.*

93 And at another day, to wit, at a district court held as aforesaid the 25th day of April, 1868, this day John C. Brown, and Virginia, his wife, and William H. Tompkins tendered their separate answers respectively, and the infant defendant Lena Tompkins, William Tompkins, jr., Caroline Tompkins, Clarence Tompkins, and Charles C. Tompkins, jr., by their guardian ad litem Samuel A. Miller, tendered their joint and separate answer to the bill of complainant, all of which were ordered to be filed, and to which said several answers the complainant replied generally. (Said answers are in the words and figures following, to wit:)

*Answer of John C. Brown and wife.*

The separate answer of John C. Brown and Virginia, his wife, late Virginia Tompkins, to the bill of complaint filed by Alfred A. Thornton in the district court of the U. S., holden at Charleston, Kanawha, for the district of W. Va., against Rachel M. Tompkins, himself, and others.

To the hon. Judge John J. Jackson, jr., of the said court:

The defendants John C. Brown and Virginia, his wife, saving and reserving to themselves by way of exceptions, demurrer, or otherwise, to said bill of complaint, and each and every part thereof, for answer thereto, or to so much as he is advised it is material or necessary for him to make answer to, says that, having read the answer of Mrs. R. M. Tompkins, co-defendant, and the separate answer of W'm H. Tompkins, they adopt it as their own, the statements therein made are true to the
94 best of their knowledge and belief, and moreover states that on their part in the partition as made amongst the devisees of W'm Tompkins, deceased, there was no design, intent, or attempt to cheat, wrong, or defraud Alfred A. Thornton, or any other of the creditors of Beverly Tompkins, and that the partition was made at the request of Mrs. R. M. Tompkins to ease her of the care and management of a large and troublesome estate, and to convey to her daughter Ellen R. Tompkins, then about to consumate a marriage, her full share and interest in the estate of her father.

And they humbly pray the honorable court that they may be dismissed from being made parties to the above suit.

JNO. C. BROWN,
*And for his wife Virginia Brown.*

Sworn to before me in open court this 24th day of April, 1868.
JASPER Y. MOORE,
*Clerk D. C. U. S. for D. W. Va.*

*Answer of W'm H. Tompkins.*

The separate answer of William H. Tompkins to the bill of complaint filed by Alfred A. Thornton in the district court of U. S., holden at Charleston, Kanawha, for the district of West Va., against Rachel M. Tompkins, himself and others.

To the Hon'ble John J. Jackson, jr., judge of said court:

The defendant, William H. Tompkins, saving and reserving to
95 himself all benefit by way of exception, demurrer, or otherwise to said bill of complaint and each and every part thereof, for answer

whole, or nearly the whole, of his interest in the estate long before that time. Respondent declares that the property conveyed in said deed to his wife and children was not and is not claimed by him, directly or indirectly, as his right or property, but was given to his wife and children as a gratuity and gift.

And having thus answered, he prays to be hence dismissed.

B. TOMPKINS.

Subscribed and sworn to before me the 23rd day of April, 1868.

H. C. McWHORTER,
*Deputy Clk U. S. D. C. D. of W. Va.*

91 And at another day, to wit, at a district court held as aforesaid the 24th day of April, 1868, ordered that Samuel A. Miller, esq'r, be, and he is hereby appointed, guardian ad litem, to answer and make defence for the infant defendants Lena Tompkins, William Tompkins, r., Caroline Tompkins, Clarence Tompkins, and Charles C. Tompkins, r., children of the defendants Beverly Tompkins and Sarah Tompkins.

And thereupon the defendants H. P. Tompkins and J. G. W. Tompkins tendered their joint answer to the bill and amended bill in this cause, which is allowed to be filed, and to which the complainant replied generally. (Said answer is in the words and figures following, to wit:)

*Answer of H. P. Tompkins & J. G. W. Tompkins.*

nswer of H. P. Tompkins and J. G. W. Tompkins to the bill
nded bill of Alfred A. Thornton, filed in the district court of
ed States for the district of West Virginia, against these
nts and others.

. John J. Jackson, judge of said court:

spondents, saving, &c., for answer to the said bill and amended
at they have seen and read the answers filed by their mother
ndant, Rachel M. Tompkins, in this suit, and they adopt the
said answers, and all the statements, allegations, and averments thereof, so far as the same are applicable to these respondents, as and for their answer in this case.

92 Respondents further say, and each of them saith, that they have not, nor hath either of them, ever received anything from the estate of their father, William Tompkins, deceased, with which they, or either of them, are chargeable under his will, save and except the property conveyed to them in the deed of partition of the 20th of April, 1867.

Respondents further state that the property settled on the wife and children of the defendant Beverly Tompkins was a gift and gratuity on the part of the brothers and sisters of the said Beverly.

Respondents deny that there was any fraud or purpose to delay, hinder, or defraud the complainant or any other creditor or creditors of the said Beverly Tompkins, in the settlement and partition of the 20th of April, 1867, nor was the same made with reference to the claim of complainant, or any other debt due from the said Beverly.

And having thus fully answered, they pray to be hence dismissed, &c.

J. G. W. TOMPKINS.
H. P. TOMPKINS.

Sworn to before me in my office this 23rd day of April, 1868.
Teste:

JNO. SLACK, *Clk.*

93 And at another day, to wit, at a district court held as aforesaid the 25th day of April, 1868, this day John C. Brown, and Virginia, his wife, and William H. Tompkins tendered their separate answers respectively, and the infant defendant Lena Tompkins, William Tompkins, jr., Caroline Tompkins, Clarence Tompkins, and Charles C. Tompkins, jr., by their guardian ad litem Samuel A. Miller, tendered their joint and separate answer to the bill of complainant, all of which were ordered to be filed, and to which said several answers the complainant replied generally. (Said answers are in the words and figures following, to wit:)

*Answer of John C. Brown and wife.*

The separate answer of John C. Brown and Virginia, his wife, late Virginia Tompkins, to the bill of complaint filed by Alfred A. Thornton in the district court of the U. S., holden at Charleston, Kanawha, for the district of W. Va., against Rachel M. Tompkins, himself, and others.

To the hon. Judge John J. Jackson, jr., of the said court:

The defendants John C. Brown and Virginia, his wife, saving and reserving to themselves by way of exceptions, demurrer, or otherwise, to said bill of complaint, and each and every part thereof, for answer thereto, or to so much as he is advised it is material or necessary for him to make answer to, says that, having read the answer of Mrs. R. M. Tompkins, co-defendant, and the separate answer of W'm H. Tompkins, they adopt it as their own, the statements therein made are true to the
94 best of their knowledge and belief, and moreover states that on their part in the partition as made amongst the devisees of W'm Tompkins, deceased, there was no design, intent, or attempt to cheat, wrong, or defraud Alfred A. Thornton, or any other of the creditors of Beverly Tompkins, and that the partition was made at the request of Mrs. R. M. Tompkins to ease her of the care and management of a large and troublesome estate, and to convey to her daughter Ellen R. Tompkins, then about to consumate a marriage, her full share and interest in the estate of her father.

And they humbly pray the honorable court that they may be dismissed from being made parties to the above suit.

JNO. C. BROWN,
*And for his wife Virginia Brown.*

Sworn to before me in open court this 24th day of April, 1868.

JASPER Y. MOORE,
*Clerk D. C. U. S. for D. W. Va.*

*Answer of W'm H. Tompkins.*

The separate answer of William H. Tompkins to the bill of complaint filed by Alfred A. Thornton in the district court of U. S., holden at Charleston, Kanawha, for the district of West Va., against Rachel M. Tompkins, himself and others.

To the Hon'ble John J. Jackson, jr., judge of said court:

The defendant, William H. Tompkins, saving and reserving to
95 himself all benefit by way of exception, demurrer, or otherwise to said bill of complaint and each and every part thereof, for answer

thereto, or to so much as he is advised it is material or necessary for him to make answer to, says that he is one of the children, heirs-at-law, and devisees of the late W'm Tompkins of Kanawha County, he being the second son in age; that after his father's death, being the oldest son then at home, he was employed by his mother, executrix of the said William Tompkins, in the management of the estate; that he continued in this employment up until the settlement of April, 1867, except during a part of the war, when he was absent.

This defendant therefore says that, being intimately connected with his mother's business and that of the estate, he has and had a personal knowledge of the condition and situation of Beverly Tompkins' accounts with and advancements from the estate. That he hath read the answer of his mother and co-defendant Rachel M. Tompkins to the amended bill of complainant, and that he knows the facts therein stated as to the amounts advanced to said Beverly to be true, just, and correct, and he, this defendant, adopts said answer as his own upon the facts therein stated, and prays that it may be so read and considered by the court.

The defendant, further answering, says that the charge made in said amended bill that the settlement and deed of April 20th, 1867,
96 made with and by the devisees of said William Tompkins, was made with a fraudulent intent to protect and shield said Beverly from the payment of complainant's or any other debt, or for any fraudulent design or purpose whatever, is wholly false and untrue. The reason and design of the same is correctly stated in said answer of his mother, and it had no other purpose or intent.

This defendant, further answering, says that the charges contained in the amended bill that he, this defendant, had received any advances from the estate previous to the 20th April, 1867, is also false and untrue; on the contrary, the estate was in debt to him, and always had been to some extent for his services aforesaid. And he now distinctly avers that up to the time of the execution of the deed of April 20, 1867, he had never received one cent on account of advances under the will, or on any other account, since his father's death.

The charge that Beverly or any one else of his co-devisees are entitled to a farther participation in the Steele lands is also untrue, as this defendant took the said interest at a hazard as to the quantity and value; the number of acres was not then ascertained, and its value is even now exceedingly doubtful and uncertain, as all lands situated as these are. This defendant, among other things, received & took an interest in some property in Ohio, and which was valued to him, as he now recollects, at
$1,200, the whole of which turned out wholly worthless to him
97 without fault on his part; but he has never supposed that he had any right to demand of his co-devisees that they should make up this loss to him; on the contrary, all parties, being alike informed as to the property to be divided, acted and judged for themselves, and what was done was considered final and conclusive.

The cause of the subsequent deed being made by the parties to this defendant in reference to the Steele land, was that the deed of April 20, 1867, only conveyed lands lying between Kelly's Creek and Witches Creek, whilst a portion of the lands turned out upon a partition of the Steele lands to lie below Witches Creek, and were therefore not embraced in the deed of April 20, 1867, it being understood and agreed that this defendant was to have all the lands belonging to William Tompkins in what is known as the upper division of the Steele tract or survey.

And having fully answered, this defendant prays hence to be dismissed with his proper costs.

WM H. TOMPKINS.

Sworn to before me in open court this 24th day of April, 1868.

JASPER Y. MOORE,
98 *Clerk U. S. D. C. for D. W. Va.*

*Answer of infant def'ts.*

The joint and separate answer of Lena Tompkins, William Tompkins, jr., Caroline Tompkins, Clarence Tompkins, Charles C. Thompson, jr., by their guardian ad litem S. A. Miller, to the bill of complaint filed in dis. court of U. States, by Alfred A. Thornton against Beverly Tompkins, them, and others.

To the Hon. John J. Jackson, jr., judge of said court:

The said defendants, Lena, William, Caroline, Clarence, and Charles C. Tompkins, all of whom are infants of tender years, by their guardian ad litem, S. A. Miller, reserving and saving to themselves the benefit of all exceptions by way of demurrer or otherwise to said bill of complaint, and each and every part thereof, for answer to said bill say: That all and each of said defendants are infants of tender years and children of Beverly Tompkins and Sarah A. Tompkins, his wife; that they nor do either of them know anything of the matters of complaint set up in said bill, and they do not nor doth either of them admit any of the allegations of said bill, but so far as they or either of them are to be affected by the same, they require strict proof thereof. The said defendants further say they are infants under the age of 21 years, and that they and each of them rely upon this hon. court to protect their rights in the subject-matter of controversy in this suit.

99 And having fully answered prays hence to be dismissed with their proper costs, &c.

LENA TOMPKINS,
WILLIAM TOMPKINS, JR.,
CAROLINE TOMPKINS,
CLARENCE TOMPKINS,
CHA'S C. TOMPKINS, JR.,

By their guardian ad litem.

S. A. MILLER.

Affidavit waived.

HEDRICK & QUARRIER,
*For Comp't.*

And at another day, to wit, at a district court held as aforesaid, the 29th day of April, 1868, came Mortimer H. Norton, survivor of Hewitt Norton & Co., and filed his petition, praying that he might be made a party defendant to this suit, and that his said petition might be held and considered for his answer therein; and therefore it is ordered that said petition be filed, and that said Mortimer be made a party defendant to this suit, and that said petition be taken and considered as his answer to the bill and amended bill; and therefore the complainant replied generally to said answer.

(For petition and answer of Norton above mentioned, see page 115 of this record.)

And at another day, to wit, at a district court held as aforesaid, the 27th day of November, 1868, this cause came on to be heard upon the

bill and amended bill and exhibits, the answers of Rachel M. Tompkins to the bill and amended bill, the answer of H. P. Tompkins and J. G. W. Tompkins to the original and amended bill, the answer of T. B. Swann to the same, the answer of Beverly Tompkins to the same, the answer of Lena Tompkins, William Tompkins, jr., Caroline Tompkins, Clarence Tompkins, and Charles C. Tompkins, jr., infant children of Beverly, by their guardian ad litem, Samuel A. Miller, to the amended bill, and exhibits filed with said answers, replications to said answers, the bill and amended bill taken for confessed as to Sarah Tompkins, the wife of Beverly Tompkins, the amended bill taken for confessed as to William H. Tompkins, and the bill and amended bill taken for confessed as to Mary Swann, wife of T. B. Swann, the original bill taken for
100 confessed as to Ellen R. Tompkins, the amended bill taken for confessed as to H. P. Tompkins, trustee, the joint and separate answer of John C. Brown and Virginia, his wife, the replications to the answer, the petition of Hewitt Norton & Co., the report of Commissioner A. T. Laidley, to which there is no exception, and the proceedings heretofore had at the rules, the former orders and decrees had in the cause, and was argued by counsel.

Upon consideration of all of which the court is of opinion and doth decide, that the will of William Tompkins, deceased, doth vest in the defendant, Rachel M. Tompkins, executrix, a life estate in all the real and personal estate of which the testator died seized and possessed; and that the said executrix had power, under the will, to use the estate so devised to her for the purpose of her own maintenance and support, and for the purpose of maintaining and educating the infant children, and of making advancements to the adults whether they were of full age at the time of the death of the testator or afterwards arrived at full age, but that she had no title to, or power to dispose of, the remainder in fee of the land, but that the remainder in fee was, by the express terms of the will itself, vested in the eight children of the testator jointly and equally, and that the remainder in fee so vested in the said Beverly Tompkins is liable to the lien of his judgment creditors, and that no deed of partition made between the life tenant and the other devisees could divest the lien of said judgments, provided the same had been duly docketed;
101 but the court is further of opinion that if the said executrix, with the consent of the said Beverly and the other devisees, had, prior to the rendition of any of the judgments mentioned in the commissioner's report, made to said Beverly advancements in excess of his share of the personal estate of the said William Tompkins, deceased, that in justice to the other devisees such advancements should constitute the first lien on his remainder in fee, and that the judgment creditors are entitled to liens in the order of their several priorities; and the court is further of the opinion not to disturb the deed of partition made between the devisees, heirs, and executrix, unless the devisees, heirs, and said executrix so request, but to apportion the lien of the judgments among the parties who hold under the deed of partition, so that the liens ascertained in this cause shall bind one undivided eighth of each of the parcels of land allotted to the several grantees in the said partition deed, except the land allotted to Beverly Tompkins, which the court is of opinion should be exhausted before the creditors are entitled to go upon the interest of the others, and the interest in the land of Francis Thompson, deceased, he acquired by virtue of his marriage with Sarah Thompson, his wife, in the estate of her father said Francis Thompson, should also be exhausted before going upon the lands allotted to the other grantees in said deed of partition.

It is therefore adjudged, ordered, and decreed, that the report of said commissioner be approved and confirmed, and that unless the said Beverly Tompkins do, within sixty days from this day, pay to the
102 creditors the amounts ascertained to be due them on their judgments aforesaid, that Charles Hedrick, who is hereby appointed a special commissioner for that purpose, do sell at public auction, to the highest bidder, before the door of the court-house of Kanawha County, the tract of land situated near the Burning Spring Hollow, in Kanawha County, and allotted to said Beverly Tompkins in the deed of partition aforesaid, and also the life-estate of said Beverly Tompkins in the lands descended to his wife from her father, said Francis Thompson, deceased, after having given 60 days' notice of the time and place and terms of sale, in some newspaper published in said county, requiring of the purchaser 10 per cent. of the purchase-money in cash, and the residue to be paid in four, eight, and twelve months, in equal payments, with interest from the day of sale, taking bond, with good security, and retaining the title as further security for the deferred payments, and that said Hedrick make report of his proceedings in the premises to the next term of this court.

And it is further adjudged, ordered, and decreed, that this cause be recommitted to Commissioner W. H. Hogeman, to take, state, and report an account, in conformity with the principles settled by this decree, of the advancements made by the executrix of William Tompkins, deceased, to the said Beverly, prior to the first day of the term of the circuit court for Kanawha County, held in the month of May, 1860, and in ascertaining these accounts the said commissioner is directed to regard the accounts filed with the defendant R. M. Tompkins' answer to
103 the amended bill, as prima facia correct as to dates and amount, and that he do further report whether such advancements made as aforesaid are in excess of Beverly's share of the personalty of the testator's estate.

And it is ordered that publication of notice of the time and place of taking such account in some newspaper printed in the said county of Kanawha shall be deemed equivalent to personal service upon all the parties to this suit.

And said commissioner is directed to take, state, and report any other accounts deemed pertinent by him, or that either party may desire.

104 *Report of A. T. Laidley, commissioner.*

The report of Alexander T. Laidley, commissioner, and the petition of Hewitt Norton & Co., referred to in the foregoing decree, are in the words and figures following, viz :

*Notice.*

To Alfred A. Thornton, Beverly Tompkins and Sarah, his wife, William H. Tompkins, John G. W. Tompkins, H. P. Tompkins, Thomas B. Swann and Mary, his wife, John C. Brown and Virginia, his wife, Ellen R. Tompkins, Rachel M. Tompkins in her own right and as executrix of William Tompkins:

Take notice, that on the 28th day of August, 1867, at my office in the town of Charleston, West Virginia, by virtue of a decree rendered by the United States district court held at Charleston, in a suit wherein Alfred A. Thornton is complainant and you are defendants, I shall proceed to take the following accounts:

1st. What real estate the defendant, Beverly Tompkins, owns or is entitled to in this judicial district.

2d. What liens exist upon said real estate, whether by trust deeds, judgements, mortgages, or otherwise, and the several priorities of said liens.

3d. What advancements have been made to the said Beverly by the executrix of W'm Tompkins, dec'd, by virtue of the will of said decedent, the date of said advancements, the character of the ad-
105 vancements, whether in money, slaves, or lands.

4th. Whether said Beverly has drawn more than an eighth part of the personal estate of which W'm Tompkins, dec'd, possessed.

5th. Whether the rents of the real estate owned by the said defendant, Beverly Tompkins, will discharge said liens within five years.

6th. And such other and further accounts as any party to this suit may require.

ALEX. T. LAIDLEY,
*Commissioner.*

*Affidavit to notice.*

STATE OF WEST VIRGINIA,
*Kanawha County, to wit:*

This day personally appeared before me, a justice of the peace in and for the county and State aforesaid, James M. Quigley, of the Kanawha Republican office, and made oath that the annexed printed notice was published in the Kanawha Republican, a newspaper published in the town of Charleston, in said county of Kanawha, for four successive weeks, the first insertion being on the 31st day of July. 1867, and a copy thereof was posted at the front door of the court-house of said county, on the 31st day of July, 1867. Given under my hand this 19th day of September, 1867.

GEORGE RITTER, *J. P.*

*Commissioners report &c a'c.*

COMMISSIONER'S OFFICE, *August 28th*, 1867.

106 To the hon. judge of the United States district court held at Charleston:

Under the notice above posted, I opened this cause for the account ordered under your decree, and was ready to proceed with same The defendant, Beverly Tompkins, came before me in person, and stating that he was not then prepared with his papers and proofs, I adjourned any proceedings in the cause until Monday next, the 2d day of September.

ALEX'R T. LAIDLEY, *Comm'r.*

And on this third day of December, 1867, having been delayed in proceeding with the account, in order to procure from a defendant in the cause information to enable a report upon the third enquiry of the decree, at the instance of the complainant's counsel, I resume the taking of the account as to the other matters directed.

A special report was made as to Mrs. Rachel M. Tompkins' failure to lay before me the information material in that report.

And now, proceeding to ascertain what liens exist upon the real estate owned by the defendant, Beverly Tompkins, I find that at a circuit court held for the county of Kanawha, on the day of May, 1860, Charles Conner recovered a judgement aginst the said Beverly Tompkins for the sum of $535 53 cents, with legal interest thereon from the 27th day of April, 1859, until paid, and $7 65 cents.

That the same term, Hewitt Norton & Co. recovered a like judgement against the same defendant for the sum of $571 09, with in-
107 terest from the 13th day of March, 1858, until paid, and $7 81 cents costs.

That at the August term, 1860, of the county court of the said county of Kanawha, John Sweeasy & Co. recovered a judgement against the same defendant for $137 76, with legal interest thereon from the 26th day of April, 1860, until paid, and $6 91 costs.

That at the February term, 1861, of the county court of the said county of Kanawha, Alfred A. Thornton, the complainant in this suit, recovered a judgement against the said Beverly Tompkins for $2,210, with legal interest on $570 26, part thereof, from the 26th day of August, 1856; on $100, other part thereof, from the 21st day of October, 1857; and on $1,540, other part thereof, from the 1st day of January, 1860, until paid, and $7 59 costs. Subject to a credit of $258 33 paid November 1st, 1859.

I find that at the October term of the circuit court of the county of Kanawha for the year 1865, Anderson A. Rock, who sued for the use of W'm T. Vintrone, recovered judgement against the said Beverly Tompkins for $30 37, with interest thereon from the 14th day of May, 1861, until paid, and $7 15 costs.

That at a circuit court held for said county, the term of which
108 commenced on the 2nd day of June, 1866, R. W. Rennick recovered a judgement against the said Beverly Tompkins for $160, with interest from the 23rd day of November, 1859, until paid, and $7 15 costs.

That at the same term, C. C. Nickols recovered a judgement against the same defendant for $1,461 77, with interest from the 16th day of September, 1865, until paid, and $7 96 costs.

That at the same term William T. Vintroux and Olivia Vintroux recovered judgement against the same defendant for $35, with legal interest thereon from the 15 day of June, 1856, until paid, and $98 16 costs.

That at the same term the Bank of Virginia recovered judgement against the same defendant for the sum of $480, with interest thereon from the first day of August, 1861, until paid, and $9 63 costs.

And I find that at a term of the said circuit court, the session of which began on the 2d day of October, 1867, C. H. McCormack and brother recovered a judgement against the same defendant for $100, with legal interest thereon from the 17 day of July, 1860, until paid, and $6 65 costs.

109 And computing interest upon these several judgements down to the first day of January next, I find that the aggregate of the same will be $7,937 42, as shown by the statements following:

| | |
|---|---|
| The judgement of Charles Conner | $535 53 |
| Interest from the 27th April, 1859 | 278 72 |
| Costs | 7 65 |
| | $721 90 |

| | |
|---|---|
| The judgement of Hewitt Norton & Co | $571 09 |
| Interest from the 13 March, 1858 | 335 53 |
| Costs | 7 81 |
| | $914 43 |

| | | |
|---|---|---|
| The judgement of John Swasey & Co | | $137 76 |
| Interest from the 26th day of April, 1860 | | 63 42 |
| Costs | | 6 91 |
| | | $208 09 |
| The judgement of Alfred A. Thornton | | $2,210 00 |
| Interest on $570 26 from August 26th, 1856, to the 1st November, 1859 | $108 66 | |
| On $100 from the 21 October, 1857, to 1st November, 1859 | 12 15 | |
| Costs | 7 59 | |
| | | $128 40 |
| | | $2,338 40 |
| Deduct payment November 1st, 1859 | | 258 33 |
| | | $2,080 07 |
| 110 Interest on $670 26, from the 1st November, 1859, to 1st January, 1868 | $328 38 | |
| On $1,540 from the 1st January, 1860, to 1st January, 1868 | 739 20 | |
| | | 1,067 58 |
| | | $3,147 65 |
| The judgement of A. A. Rock for Vintroux | | $30 37 |
| Interest from the 14 May, 1861 | | 12 16 |
| Costs | | 7 15 |
| | | $49 68 |
| The judgements of R. W. Renick | | $160 00 |
| Interest from the 22 November, 1859 | | 77 00 |
| Costs | | 7 15 |
| | | $244 15 |
| The judgement of C. C. Nichols | | $1,461 87 |
| Interest from the 16 day of September, 1865 | | 200 88 |
| Costs | | 7 96 |
| | | $1,670 71 |
| The judgement of W'm & Olivia Vintroux | | $35 00 |
| Interest from the 15 June, 1856 | | 24 25 |
| Costs | | 98 16 |
| | | $157 41 |
| The judgement of the Bank of Virginia | | $480 00 |

| | | |
|---|---|---|
| | Interest from the 1st day of August, 1861 | 182 40 |
| | Costs | 9 63 |
| | | $672 03 |
| 111 | The judgement of McCormack & Bro | $100 00 |
| | Interest from the 17 July, 1860 | 44 72 |
| | Costs | 6 65 |
| | | $151 37 |

I do therefore report that the debts appearing to be due from the said Beverly Tompkins, and which are liens upon any lands which he owns or has any interest in, amount on the first day of January, 1868, to the sum of $7,937 42.

I find that of the said judgements, the following are dockited as liens, but such docketing does not, as far as I can find, affect the priority of lien, for it does not appear that the said Tompkins has at any time conveyed or sold any property to which he is entitled, and therefore the lien of said judgements will date from their respective dates of rendition.

The judgement of the complainant dated February, 1861, docketed Mar. 30th, 1864.

The judgement of John Swasey & Co., dated August, 1860, docketed Febr'y 24th, 1864.

The judgement of Charles Connor, dated May, 1860, docketed June 4th, 1867.

The judgement of Hewitt Norton & Co., dated May, 1860, docketed January 8th, 1866.

The judgement of R. W. Renick, dated June, 1866, docketed April 24th, 1867.

112 The judgement of C. C. Nichols, dated June, 1866, docketed April 24th, 1867.

The order of priority, then, of said judgements is as follows:

The judgement of Charles Conner, amounting, as aforesaid, to the sum of $721 90, and the judgement of Hewitt, Norton & Co., amounting, as aforesaid, to the sum of $914 43, being, together, the sum of $1,636 33, is the first lien.

The judgement of John Swasey & Co., amounting to $208 09, is the second lien.

The judgement of the complainant, amounting to $3,147 65, is the third lien.

The judgement of A. A. Rock, for V., amounting to $49 68, is the fourth lien.

| | | |
|---|---|---|
| The several judgements of R. W. Renick, of | | 244 15 |
| | of C. C. Nichols, of | 1,670 71 |
| | of W'm T. and O. Vintroux | 157 41 |
| | and of the Bank of Virginia | 672 03 |
| amounting together to | | $2,744 30 |

is the fifth lien.

And the judgement of McCormack & Bro., of $151 37, is the sixth lien.

113 And having thus ascertained the indebtedness of the said Beverly Tompkins, as far as the records of the courts in this county

show it, I proceed to show what real estate the said defendants owns, or is entitled to, in this judicial district.

It will be seen by the deed of partition dated the 20th of April, 1867, and marked as Exhibit —, with the bill in this cause, that there was set off and allotted to the said Beverly an undivided interest in 300 acres of land, part of the Steele survey of 27,000 acres, in this county, and lying in what is known and called the "Burning Spring Hollow;" this is, first, unimproved land, valuable only for its timber and coal-mining priviliges, and is valueless for anything else.

It is set forth in this deed of partition that the said Beverly had received his full share of his father's estate, by way of advancements, to which statement he assents, and is a party to the said deed. I find that a portion of his father's estate is settled by the said deed of partition for the benefit of his children, and held by a trustee for their use.

The said Beverly has a life estate in some lands which have been recently allotted in a deed of partition between the heirs of the late Francis Thompson, deceased, directed to be made by the decree of the 12th October, 1867, in the suit in chancery, in the circuit court of this county, wherein George P. Thompson is complainant and W'm A.
114 Thompson and others are defendants, to Sallie H. Tompkins, the wife of the said Beverly. This property consists of 375 acres of land, and three lots and a fraction, containing about one and a half acres, in the town of Philippi, at the mouth of Coal River, in the county of Kanawha.

This is all the estate that I can ascertain as belonging to the said Beverly.

The annual value of all his estate will not pay even the interest that will accrue upon the debts aforesaid in five years, much less discharge the principal. As to such annual rents, issues, and profits, I refer the court to depositions taken and returned with this report, marked with the printed letter G.

I am required to report what advancements had been made to the said Beverly Tompkins by the executrix of the late W'm Tompkins, dec'd, by virtue of his will, and whether the said Beverly has drawn more than an eighth part of the personal estate of his father. As to these enquiries, I made efforts to obtain from the executrix such information as was essential to enable me to make a report. Mrs. Tompkins refused to give the necesary information, and at the last term of your court I reported that fact. Without it it was impossible to arrive at any statement that would put the court in possession of the facts required by that part of the decree.

I respectfully submit the report.

ALEX'R T. LAIDLEY,
*Sp'l Comm'r.*

115 *Costs of report.*

| | |
|---|---|
| Printer's fee | $9 00 |
| Sh'ff | |
| Witnesses | |
| Comm'r | |

And having retained the report in my office for the period of ten days, I return it on this 16th day of March, 1868.

ALEX'R T. LAIDLEY.

(See page 118 for the depositions referred to in the foregoing report of A. T. Laidley.)

*Petition of Hewitt, Norton & Co.*

The petition of Mortimer H. Norton, surviving member of the firm of Hewitt, Norton Co., composed of James Hewitt, now deceased, and said petitioner.

To the Hon. J. J. Jackson, judge of the district court of the United States for the district of West Virginia:

Your petitioner, Mortimer H. Norton, respecfully represents to your honor that Alfred A. Thornton heretofore filed his bill and amended bill in equity in your honorable court against Beverly Tompkins and others, the object of which suit is to set aside certain deeds and conveyances of certain lands conveyed by said Beverly Tompkins and others to the wife and children of said Beverly, and to subject the interest of said Beverly in the estate of his father to the judgement of said complainant against said Beverly, and have the same sold for the satisfaction thereof; which bill and amended bill are now pending, and said suit is now undetermined, in said court. All the parties who were made defendants to said bill and amended bill have filed answers thereto. That
116 said cause was, at the term 1867, referred to Alex. T. Laidley, a master com'r of this court, who made and returned a report of his proceedings therein; which bill, amended bill, and exhibits, answers and exhibits, report and exhibits, together with the decrees, orders, and proceedings had in said cause, your petitioner prays may be taken, read, and considered as part of this petition.

Your petitioner further represents that said firm of Hewitt, Norton & Co., of which he was a member, and of which he is the survivor as aforesaid, on the — day of May, 1860, obtained a judgement in the cir. court of Kanawha County, in the then State of Virginia, now in the State of West Virginia, within the jurisdiction of this honorable court, and within the county of Kanawha aforesaid, wherein the property sought to be subjected is located, for the sum of $571 09c., with legal interest thereon from the 13th day of March, 1858, until paid, and $7 81c. costs, which judgement constituted, from the first day of the term of the court at which it was rendered, a lien on all the real estate of which said Beverly was then or has since been possessed, or to which he was then or has since been entitled in law or equity; and it will be seen by the will of said Beverly's father, filed as an exhibit with said bill of complainant, that said Beverly was at *at* the date of your petitioner's judgement entitled to an estate in fee in one-eighth of the real estate of which his father died seized, subject to his mother's life estate. Said judgement was dockited as a lien on the said land on
117 the 8th of Jan'y, 1866. That said judgement remains wholly unpaid or satisfied. Your petitioner further represents that he is informed and believes, and that the papers herein referred to and made exhibits shew, that there are other creditors of said Beverly who have liens on said interest of said Beverly in said lands, which creditors your petitioner suggests should be convened before your honor in this cause.

Upon consideration of all which your petitioner prays that he may be let in as a party defendant to said bill and amended bill, and that this petition be taken as his answer thereto; that said cause be referred to a master, who shall be required to convene all the creditors of said Beverly holding liens upon his said estate in said land, and ascertain all such liens and their several priorities; that said lands may be sold, and the proceeds applied to the satisfaction of your petitioner's and

other liens, according to their priorities; and for such other and further relief in the premises as to equity and good conscience shall seem meet and the circumstances of your petitioner's case may require.

And will ever pray, &c.

MORTIMER H. NORTON,
*Survivor of the Firm of Hewitt, Norton & Co., by Counsel.*

Affidavit waived.

QUARRIER, *Sol's.*

118 In the United States court for the district of West Virginia, held at Charleston, Kanawha.

ALFRED A. THORNTON
*vs.*
BEVERLY TOMPKINS AND OTHERS. } In chancery.

COMMISSIONER'S OFFICE, *Charleston.*

The deposition of DAVID L. RUFFNER, a witness called by the complainant, of lawful age, and first duly sworn, deposes and says:

Question by counsel for complainant. State whether or no you are acquainted with that part of the Steele survey of 27,000 acres of land in which the late W'm Tompkins held an interest, being some 300 acres, and in which Beverly Tompkins now owns an undivided interest, under a deed of partition made between the heirs of the said W'm Tompkins, dec'd, and which is described in that deed as lying in the Burning Spring Hollow. State, also, if you did not survey and allot amoung the heirs of the late Francis Thompson, dec'd, certain lands in the county of Kanawha, and whether or not you are acquainted with that part of those lands were allotted and assigned to Mrs. Tompkins, the wife of the said Beverly, in which the said Beverly has a life estate.

Answer. I am acquainted with the land mentioned in the first part of the question, as part of the Steele survey. It is front land, unimproved.

I know nothing of the Thompson lands spoken of in the question.

119 Was not the surveyor, but have understood that John L. Cole made that survey.

2d question by same. State what, in your opinion, is the annual value of the interest mentioned in the question as respects the 300 acres in Burning Spring Hollow.

Answer. As the land stands, without the privilege of cutting timber or mining for coal, I do not think it is worth anything as an annual rent. I know of no improvement in the land, of any value, nor of any coal banks being opened, so that, in my opinion, its annual value is nothing, comparatively speaking. It might perhaps produce enough to pay the taxes upon it.

And further deponent saith not.

D. L. RUFFNER.

| | |
|---|---|
| Witness claims for one day's attendance | $2 00 |
| 12 miles' traveling | 1 20 |
| | $3 20 |

And the taking of any further depositions herein is adjourned until to-morrow.

And on Thursday, the 12th day of April, 1868, JOHN L. COLE, a witness called by the complainant, of lawful age, and duly sworn, deposes and says:

120 Question by compl't. State if you were one of the commissioners appointed under a decree of the circuit court of the county of Kanawha, in the suit of George P. Thompson and others against W'm N. Thompson & others, for partition of the lands of the late Francis Thompson, dec'd, and whether or not you laid off and assigned to Mrs. Tompkins, the wife of Beverly Tompkins, a portion of the lands.

Answer. I made the survey of those lands, and was one of the commissioners who made the partition. We gave to Mrs. Sallie H. Tompkins, one of the heirs of Francis Thompson, dec'd, wife of Beverly Tompkins, in severalty, subject to the marital rights of her husband, 375 acres of land; and also 3 other lots, and a fraction of a lot, in the town of Phillipi, at the mouth of Coal River. And this allotment, I believe, was confirmed by a decree of said court, on the 12th October last.

Question by same. State your opinion of the annual value of the lands and lots.

Answer. I think that the 375-acre tract is worth three or four dollars per acre, and that the annual value is nothing. The three lots and a fraction in the town of Phillipi are together worth from $800 to $1,000, but they are unimproved and unproductive, and their annual value is very little, if anything.

And further the deponent saith not.

JOHN L. COLE.

Witness claims for one day's attendance.

121 The foregoing depositions were duly taken and subscribed before me, at the times, place, and in the manner stated in the several captions.

Given under my hand.

ALEX'R T. LAIDLEY,
*Sp'l Comm'r.*

And at another day, to wit, at a district court, held as aforesaid, the 28th day of April, 1869, on motion of William H. Tompkins, and for reasons appearing to the court, it was ordered that Lewis Ruffner and Henry C. Dickinson be summoned to appear before the court on the then next day, to show cause, if any they had, why the sale made by C. Hedrick, special commissioner in this cause, of Beverly Tompkins' interest in 300 acres of land, more or less, of which they were the purchasers, should not be set aside and a resale had.

122 And at another day, to wit, at a district court, held as aforesaid, the 30th day of April, 1869, Charles Hedrick, special commissioner in this cause, having filed his report, showing that under a decree made herein at the last term he had sold certain real estate in said decree mentioned and directed to be sold by him, and one of the defendants, Beverly Tompkins, having filed exceptions to said report as to the sale of the 300 acres of land described in the papers in this cause, on the ground of the inadequacy of price, and also filed affidavits in support of said exceptions, the purchasers, Lewis Ruffner and Henry C. Dickinson, having also filed affidavits in opposition to said exceptions,

and there being no other exceptions to said report, the same was approved and confirmed, except as to the matters so excepted to; and said commissioner is directed to withdraw the bonds of A. G. Eastham and George P. Thompson, given for the purchases made by them, and collect the deferred payments secured thereby; and, upon their paying in full, to make them deeds for their several purchases.

And the court, having maturely considered the matter of said exceptions, the affidavits filed for and against the same, and heard the arguments of counsel, doth order that the said sale to the said Dickinson and Ruffner be set aside, provided said Beverly Tompkins, or some one for him, pay to the said commissioner the expenses of said sale, and any expenses the purchasers aforesaid have been put to in making said purchase, and interest on the cash payment made them—all to
123 be ascertained by said commissioner; and also execute and file with the clerk of this court a bond or written agreement, with good security, that at another sale of said land it shall bring at least double the bid of said Ruffner and Dickinson; that is to say, double four hundred and twenty-five dollars; and the said Beverly Tompkins, by William H. Tompkins, complying with said conditions, it is ordered that said commissioner do resell said interest of said Beverly Tompkins in said Steele survey in the same way and on the same terms required by the last decree herein; and said commissioner shall immediately after such compliance of said Beverly Tompkins return to said Ruffner and Dickinson the cash payments made by them, with legal interest and the legal expenses aforesaid; and said commissioner shall report his proceedings in the premises to the next term of this court.

The report of Special Commissioner Charles Hedrick, and the affidavits referred to in the foregoing decree, are in the words and figures following, to wit:

*Report of Charles Hedrick, special commissioner.*

COMMISSIONER'S SALE OF LANDS.—NOTICE.

Pursuant to a decree of the district court of the United States for the district of West Virginia, sitting at Charleston, entered the
124 27th November, 1868, in a suit therein pending in chancery, wherein Alfred A. Thornton is complainant and Beverly Tompkins and others are defendants, the undersigned, special commissioner, will offer for sale, on the 12th day of April, 1869, at auction, to the highest bidder, before the door of the court-house of Kanawha County, the following real estate: Three hundred acres of land, more or less, being an undivided interest in the Steele survey of 27,000 acres, lying back of the Burning Spring, on the east side of Kanawha River, and allotted to said Beverly in the deed of partition between the devisees of his father, W'm Tompkins, deceased.

Terms: Ten per cent. of the purchase money will be required in hand, and the residue in four, eight, and twelve, equal payments, with interest from day of sale, the purchaser to give bond, with good security, for the deferred payments, and the titled to be retained as further security.

Feb. 1, 1869, ts.] C. HEDRICK,
*Special Commissioner.*

The above sale is postponed to Monday, the 19th April, 1869.

C. HEDRICK,
*Special Com'r.*

*Report of sale.*

In chancery in the district court for the district of W. Va., sitting at Charleston.

ALFRED A. THORNTON
*vs.*
BEVERLY TOMPKINS & OTHERS.

125 To Hon. J. J. Jackson, judge, &c.:

The undersigned, your sp'l com'r, appointed by a decree made the 27 Nov., 1868, in the above-entitled cause, to sell certain real estate in said decree mentioned, respectfully reports that, in pursuance of said decree, he advertised the sale of said property in a newspaper as directed, for sale on the 12th day of April, 1869, at auction, at the front door of the court-house of Kanawha County; that he offered the property to the highest bidder accordingly at public out-cry; and for the 375 acres near Coal's Mouth and Kanawha River; the highest bid for the life estate therein of Beverly Tompkins was $112 00, and was made by Albert G. Eastham; and the highest for the life estate of said Beverly in three lots and a fraction, situate in the town of Phillipi, was $45, made by George P. Thompson; and the highest bid for the estate of said Beverly in fee in 300 acres, more of less, in the Steele survey of 27,000 acres, lying back of Burning Spring, was $425 00, made by Lewis Ruffner and Henry C. Dickinson. The sale was adjourned over on said bids until the next day (13th April) on those bids by public announcement made by the crier, and the same bids cried, but no higher bids obtained for either property; and your com'r, deeming he had obtained a bid for the life estate in the 375 acres, and in the 3 lots and fraction of a lot, after having the same cried for the greater portion of the
126 day, caused the same to be knocked off to said Earthman and said Thompson at their aforesaid bids. But deeming that the said interest in the Steele survey had not brought an adequate bid again adjourned the sale thereof, by public announcement, to the 19th inst., being the 1st day of the present term of your court, and appended and published notice thereof at the foot of the first advertisement, and had the same printed in the same newspaper.

On the said 19th said interest in said 27,000 acres was again offered at the same place and on same terms at public auction to the highest bidder, and cried the greater part of the day, and the highest bid obtained was $425 00, which bid was also made by said Ruffner & Dickinson, and your com'r believing he had done all he could to obtain the highest price for that property that it would bring, knocked it off to said bidders at said bid of $425 00. The decree under which your com'r acted is filed with the papers in this cause, and copies of the advertisements, including the notice of postponement of sale, are herewith attached as part hereof, marked "A." (See notice heretofore copied and made a part of this record.) The sales were made according to said advertisements, &c.

Said Eastham made the cash payment, (10 per cent. on his bid being $13 50,) and gave his bonds for the residue for equal payments of $33 60 each, at 4, 8, & 12 months, with interest from day of sale, with your com'r as security. Said Thompson also made the cash payment
127 ($4 50, on his bid, and gave his bond for the residue in equal payments of $13 50 each, at 4, 8, & 12 months, with interest from day of sale, with N. Fitzhugh as his security.

Said Ruffner & Dickinson also made the cash payment ($42 50) on their bid, and gave their bond for the residue in three equal payments of $127 50 each, with interest from day of sale, and with C. D. Reynolds as their security.

These bonds are all duly stamped, and the said Eastham's marked "B," the said Thompson's marked "C," and the said Ruffner & Dickinson's marked "D," and are herewith returned as part of this report. A lien on the property so sold is retained in each case as further security.

The expenses of sale are:

| | | |
|---|---|---|
| The printer for advertising, (see bill herewith)..... | | $26 25 |
| Com'r 5 p'r c't. on cash of Eastham..... | 56 | |
| " " " Thompson..... | 20 | |
| " " " Ruffner and Dickinson..... | 2 20 | |
| " defered payments of Eastham, (½ for selling) | 1 25 | |
| " " " Thompson, ( " ) | 50 | |
| " " " Ruffner & Dickinson, ( " ) | 5 02 | |
| Crier..... | 5 00 | |
| | | 14 65 |
| | | 40 90 |
| Cash rec'd is from Eastham..... | 11 20 | |
| " " Thompson..... | 4 50 | |
| " " Ruffner & Dickinson..... | 42 50 | |
| | | 58 20 |
| Bal. in hand after paying printer, (not yet paid)..... | | 17 30 |

128 All of which is respectfully submitted.

C. HEDRICK, *Sp'l Com'r.*

APRIL 27, 1869.

See full statement in next report.

*Exceptions to report.*

The confirmation of this report of sales is objected to, so far as the same refers to the tract of 300 acres of land, at or near the Burning Springs, because the said tract of land was knocked off by the crier at a grossly inadequate price, and for other reasons.

BEVERLY TOMPKINS,
*By Counsel.*

*Affidavit of Andrew Tucker.*

WEST VIRGINIA,
*Kanawha County, Malden Township:*

This day Andrew Tucker personally appeared before me, a justice of Kanawha County, and made oath that he has been well acquainted with the land sold by C. Hedrick, commissioner, on 20th April, 1869, as the land of Beverly Tompkins, for more than thirty years, and during that time has worked on the adjoining property for about ten years; that his business was a minor and manager of coal banks, and that he knows the value of above-described land, and the terms of said sale to be at least four dollars and fifty cents per acre.

Given under my hand and seal this 26th day of April, 1869.

W'M D. SHREWSBURY,
*J. P. Malden Township, Ka. County, West Va.*

129 *Affidavit of W'm H. Tompkins.*

WEST VIRGINIA,
*Kanawha County, Township to wit:*

This day W'm H. Township personally appeared before me, a justice of Kanawha County, and made oath that he is acquainted with the lands sold by Commissioner Hedrick on 20th April, 1869, as the lands of Beverly Tompkins, and known as Stele land, and that he considers it as worth at the least price under the terms of said sale three dollars per acre; said tract, he further says, contains three hundred and seventy-five acres.

Given under my hand and seal this 26th April, 1869.

W'M D. SHREWSBURY,
*J. P. Malden Township, Kan. County, West Va.*

I further state that I was present on the first day of the sale, but not present at the adjourned sale.

Sworn to in open court, April 30th, 1869.

Teste: JASPER Y. MOORE,
*Clk U. S. D. C. D. W. V.*

*Affidavit of Tho's F. Holt.*

WEST VIRGINIA,
*Kanawha County, Malden Township, to wit:*

This day Tho's F. Holt personally appeared before me, a justice of Kanawha County, and made oath that he has lived for a number of years near the land sold by Commissioner Hedrick on 20th
130 April, 1869, as the lands of Beverly Tompkins, and known as Stele land; that he knows its value and considers it worth at its lowest value three dollars per acre, and for some purposes much more.

April 26th, 1869.

W'M D. SHREWSBURY,
*J. P. Malden Township, West Va.*

*Affidavit of W'm H. Turner.*

WEST VIRGINIA,
*Kanawha County, Malden Township, to wit:*

This day W'm H. Turner personally appeared before me, a justice of Kanawha County, and made oath that he has lived for more than thirty years at the Burning Springs, and near the land sold by Commissioner Hedrick on 20th April, 1869, as the lands of Beverly Tompkins, and known as the "Stele lands;" that he is well acquainted with said land and considers that three dollars per acre would be a very low price for it.

Given under my hand and seal this 26th April, 1869.

W'M D. SHREWSBURY,
*J. P. Malden Township, Kanawha County, West Va.*

*Affidavit of William D. Shrewsbury.*

THORNTON *vs.* TOMPKINS.

WEST VIRGINIA,
*Kanawha County, to wit:*

William D. Shrewsbury personally appeared before me, a notary pub-

131 lic for the county of Kanawha and State of West Virginia, and made oath and says that he is acquainted with the location of the tract of land recently sold by Commissioner Hedrick as the property of Beverly Tompkins, and considers the same as worth not less than two dollars and fifty cents per acre, and as an attachment to what is known as the Burning Spring salt and coal property, which it adjoins, he estimates its value at not less than four dollars per acre.

Sworn to before me this 30th day of April, 1869.

R. E. PUTNEY, *N. P.*

*Affidavit of L. Ruffner.*

THORNTON *vs.* TOMPKINS.

In answer to a rule against this affiant, requesting him to show cause why the court should decline to confirm the sale of a tract of land containing "300 acres, more or less," and sold by C. Hedrick, commissioner, to H. C. Dickinson, other affiant.

He states that for more than twenty years he has been an owner of ¼ of 620 acres in Burning Spring Hollow, which includes a part of the Stele and other lands in that hollow. This interest affiant caused to be accurately surveyed some years ago, and herewith a plat of said lands.

In the division by which W'm Tompkins' title to the land in question was obtained, a reservation of ½ the whole coal was made in be-
132 half of Donnally and Stele. The timber on the land has long since been consumed.

The seams of coal being very small have been worked by the Tompkins' interest for a great number of years, and almost exclusively on the 300 acres now in question, and affiant believes that on a fair and equitable division of the coal it will be found that Tompkins, in operating his furnace, has well-nigh exhausted the entire interest in the coal to which he is entitled. The arable portion of the land within the survey of six hundred acres is mainly covered by the Harrison survey, (all old in title,) and for this reason little value is to be attached to the Beverly Tompkins' interest on account of any arable land.

Affiant here refers to the statement of W'm H. Tompkins as to the area of the land in question, and says that the survey which he caused to be made shews that (excluding the Harrison survey in which Beverly Tompkins has an interest) the interest sold by the commissioner and bought by this affiant and H. C. Dickinson does not contain more than 300 acres.

Under all the circumstances affiant would not have been willing to make the purchase on the terms of sale, but that he conceived it necessary to buy the same in order to protect the interest which he acquired may years since.

133 Affiant states that he was present and a bidder on the first day the land was offered; that the crier was diligent in seeking bids from the crowd of persons who were in Charleston; that a number of persons bid for and sought to buy the same; that late in the evening, after affiant had started home, he requested H. C. Dickinson to join him in the purchase, which said Dickinson did. Affiant believes that the sale was a fair one in all respects; that the price is as much as any prudent man would have given for such a tract of land, and the believing

that the ownership of it is necessary to protect his contiguous interest, he therefore asks that the court will confirm the sale.

April 30th, 1869.

L. RUFFNER.

Sworn to before me by Lewis Ruffner, this 30th April, 1869.

W'M D. SHREWSBURY, *J. P.*

*Affidavit of David L. Ruffner.*

THORNTON } *vs.* TOMPKINS. }

This day David L. Ruffner made affidavit that in the year 1865 he surveyed a tract of 619¾ acres of land, on Burning Spring Branch, of which the lands in controversy is a part, and from his observation of the tract, that apart from any mineral interest (of which he knows little or nothing) it is of very little value as a separate piece of property, having
134 little or no valuable timber upon it, and a very small proportion of arable land, and that, in his opinion, $425 is a sufficient price for the same.

Sworn to before me this 30th day of April, 1869.

W'M D. SHREWSBURY,
*J. P. Malden Township, Kanawha County, West Va.*

*Affidavit of Ja's Norton.*

WEST VIRGINIA,
*Kanawha County, Malden Township:*

This day James Norton personally appeared before me, a justice for Kanawha County, and made oath that he is now an old man and has spent the greater portion of his life in Kanawha County, and within a few miles of the land sold by Commissioner Hedrick as the property of Beverly Tompkins, and from his personal knowledge of said land he considers the land would at least four dollars and fifty cents per acre, and he further says *and he further says* that he has been engaged the most of his life in connection with the different branches of the salt interests, and from his familiarity with the salt and coal interests of the valley, feels sure he has placed a low estimate on said land.

Given under my hand and seal this 27th April, 1869.

W'M D. SHREWSBURY,
*J. P. Malden Township.*

*Affidavit of Nathan Stanley.*

THORNTON } *vs.* TOMPKINS. }

This day Nathan Stanley makes affidavit that he has resided in the vicinity of Kanawha Salines for many years, perhaps thirty; that
135 for fifteen years he lived at the Burning Spring, and two years adjoining the land in question in this suit, and that he is therefore well acquainted with the same; that within his own knowledge W'm Tompkins, and those claiming under him, have been using coal for the Burning Spring furnace for twenty-five or thirty years; that the veins of coal are thin and not merchantable on the land, and that by such continued use a large part of the coal in Burning Spring Hollow has been consumed.

Affiant states that there is a survey in the mouth of Burning Spring Hollow called the Harrison, which he is informed was intended and does include the tillable land on the branch, and that if, as he is informed, the Tompkins' interest is entitled to only one-half of the coal and timber in 300 acres, then affiant is certain that said interest is worth much less than it would otherwise be.

Affiant would be unwilling to give $425 for an undivided interest with so little coal, timber, and arable land, and he feels safe in saying that $425 would be a full price therefor. His opinion would be different as to its value if it had not been so stripped of timber and coal.

April 29th, 1869.

NATHAN STANLEY.

Sworn to before me by Nathan Stanley, this 30th April, 1869.

WM D. SHREWSBURY, *J. P.*

136 *Affidavit of Henry C. Dickinson.*

To the Hon. Jackson, judge of the U. S. court for the dis. of W. Va.:

The undersigned, H. C. Dickinson, who has been this day summoned to shew cause, on the 29th April before your honor, why a sale made to himself and General L. Ruffner, by C. Hedrick, commissioner, of a tract of land, "containing 300 acres more or less," belonging to Beverly Tompkins, on the day of April, 1869, should not be confirmed, states that the said tract of land was offered for sale by public auction he believes on Friday, the 19th April, 1869; that this affiant, without knowing more of the land than was to be derived from the general description, bid for the same; that the property was cried at public auction during the greater part of the day, and affiant's bid of $425 was the last and best bid; that affiant left Charleston on the evening boat while it was being cried; that Gen'l Ruffner, who bid against affiant, proposed to buy the property jointly, which proposition affiant accepted; that affiant a day or two subsequently learned from the auctioneer that the sale had been postponed a few days, and affiant then asked the auctioneer, when the property should be again offered for sale, to bid for him and Gen'l Ruffner the sum of $425, which the auctioneer accordingly did, and several days after being informed by Com'r Hedrick that affiant's bid was the last, he proceeded, in conjunction with Gen'l
137 L. Ruffner, to execute bonds and in other respects to comply with terms of sale.

Affiant expressly states that his purchase was in all respects (so far as his own conduct is concerned) fair and legal, and as such he insists upon it confirmation. Affiant does not know how the property was advertised; he saw a notice of the sale in one of the Kanawha papers, and he presumes that others as well as himself took an interest in the sale. He distinctly remembers that a number of persons (more than usual) were on the street, that the crier was seen by him crying the property with a loud voice at several public places, that he saw and heard persons asking about the property, and he distinctly remembers to have seen W'm H. and Beverly Tompkins near to, and in hearing of, the crier, some time before affiant's last bid on the first day the property was offered.

Affiant has since been shewn where the land in question is located, and if it is true, as affiant is informed, that only one-half the coal, and perhaps also ½ the timber, was the property of Tompkins, then the price, in affiant's belief, cannot be considered inadequate. There is not, per-

haps, an acre of tillable land on the tract, and it is a well-known fact that there no large veins of coal (suitable for shipping) in that vicinity. It might be mentioned also in this connection, that the amount of land is not definatily ascertained, and owing to doubts as to the true
138 Steele land, the may be very much less than 300 acres.

Affiant states that he is interested to a considerable extent in the Steele land, which he expects to sell, and that his object in buying this tract was to resell at a future day; that for this and other reason he insists upon his purchase and asks that your honor will confirm the same.

Ap'l 29th, 1869.

H. C. DICKINSON.

This day H. C. Dickinson, whose name is signed to the foregoing made affidavit before me that the same is true.

Ap'l 29th, 1869.

WM D. SHREWSBURY, *J. P.*

The following is a copy of an agreement filed with the papers of this cause:

*R. M. Tompkins and Beverly Tompkins—Agreement.*

Article of agreement, made and entered into this 2nd day of July, 1860 by and between Rachel M. Tompkins, of the first part, and Beverly Tompkins, of the second part, witnesses, that the rents hereinafter agreed to be paid by the said Beverly, the said party of the first part doth agree to lease the farm known as "Valcoulon" for the term of eight years to the said Beverly, from and after the 1st day of January, 1861. And the said Beverly on his part agrees to —— as rent for said farm, for the first year, ending on the 31st day of December,
139 1861, the sum of $1,000, and for the second year *year* the sum of $1,250 00, and for the third year the sum of $1,500, and for the fourth year the sum of $1,750, and for the fifth year the sum of $2,000 and for the sixth year the sum of $2,250, and for the seventh year the sum of $2,500, and for the eighth year the sum of $2,500, all of which sums shall be paid at the end of each year terminating on the 31st day of December in each year, with the right of re-entry on the part of said party of the first part, and to terminate this lease on the failure of said party of the second part to pay said annual rents as the same respectively fall due. But this lease is upon this condition, that after the expiration of seven years from and after the 1st day of January next, the said Rachel M. Tompkins reseves the right to terminate said lease for the unexpired term, on giving 6 months' previous notice to said Beverly, if either of the brothers or sisters of said Beverly, who may have attained their majority, shall notify said party of the first part, in writing, that he, she, or they desire to occupy said farm as tenants thereof, and for a yearly rent exceeding that herein agreed to be paid by said Beverly, in which event this lease shall cease and be determined. And it is further agreed that the said Beverly shall leave said farm and the buildings and improvements thereon in as good condition as the same now are, natural wear and decay and unavoidable accident excepted, as witness the following signatures & seals.

B. TOMPKINS. [SEAL.]

140 *Decree.*

And now, at this day, to wit, at a district court of the United States

for the district of West Virginia, held at Charleston on the 30th day of November, 1869, this cause came on to be further heard upon the papers heretofore read, the proceedings, orders, and decrees heretofore had and made herein, the report of Special Commissioner Charles Hedrick, of the sale of 300 acres of land in the bill and proceedings mentioned, and directed to be sold by the last decree, which report was filed at a former day of this term; and the report of William H. Hogeman heretofore filed, and the exceptions of T. B. Swann and others thereto, and was argued by counsel. And there being no exceptions to said report of Charles Hedrick, the same is approved and confirmed. And the said exceptions to the report of Commissioner Hogeman, being considered by the court, are overruled.

And it appearing by the report of said Hedrick that he sold said 300 acres of land according to the decree directing said resale, and that Rachel M. Tompkins was the highest bidder, and became the purchaser at the price of $850 00, and that she has fully complied with the terms of the sale,

It is adjudged, ordered, and decree that said sale be, and the same is hereby, approved and confirmed, and the said Hedrick is hereby directed to withdraw the bonds for the deferred payments, and proceed to collect the same as they respectively fall due.

And it further appearing to the court that, after applying the nett proceeds of the sales heretofore made by the said Hedrick of the
141 life interest of said Beverly Tompkins in his wife's land, and of the aforesaid 300-acre tract, to the payment of the judgment liens against his interest in the lands devised by his father, there still remains a large balance of said judgment liens unsatisfied. And it further appearing that the interest of said Beverly in the personal estate bequeathed by his father's will exceeded the advancements made to said Beverly out of said estate prior to the first day of the May term, 1860, of the circuit court of Kanawha County, and that, therefore, according to the principles settled by the decree made herein on the 27th day of November, 1868, wherein it is adjudged that *that* the partition made by the devisees of said William Tompkins, deceased, shall stand, and that said judgment liens are binding upon each of the shares of all the parties to the extent of one-eighth part thereof, except that assigned to the said Beverly, whereof the whole was bound, said judgment liens are superior to any lien or claim growing out of said advancements against said Beverly's interest in the real estate devised by his father,

It is therefore adjudged, ordered & decreed that, unless the said Beverly Tompkins, or some one for him, shall pay off and discharge the judgments aforesaid, or the balance thereof, after deducting the nett proceeds of the sales already made, and also pay the costs of this suit within 60 days after the rising of this court, Charles Hedrick and William A. Quarrier, who are hereby appointed special commissioners for that purpose, do, after first publishing in some newspaper printed in Kanawha County sixty days' notice of the time, place, and terms of sale, sell
142 before the court-house door of Kanawha County, to the highest bidder at public auction, one undivided eighth part of each share of the real estate (except that assigned to said Beverly) conveyed by the deed of partition between Rachel M. Tompkins and others, dated the 20th of April, 1867, and filed with the papers as aforesaid; that is to say, of the shares of Rachel M. Tompkins, W'm H. Tompkins, John C. Brown and wife, R. Ellen Tompkins, Henry P. Tompkins, John G. W. Tompkins, Thomas B. Swann and wife, and Henry P. Tompkins, trustee of the wife and children of said Beverly Tompkins; and said commis-

sioners shall require 20 per cent. of the purchase money to be paid in cash, and the residue in two equal payments at one and two years, with interest from day of sale, and bonds with good personal security for the deferred payments, retaining a lien as further security, and report their proceedings in the premises to this court.

It is further ordered that said Hedrick pay the money already in hand, and, out of future collections for sales already made, so far as shall be necessary, the fees and costs of the officers of this court, for their services rendered in this cause, and make report thereof to the next term.

Before said commissioners Hedrick and Quarrier receive any money for sales they shall enter into bond, with good security, before the clerk, conditioned according to law, in a penalty of $8,000 00.

And at another day, to wit, on the sixth day of January, one thousand eight hundred and seventy, an order, made by the judge of the said court in this cause, was received in the clerk's office of said court and entered upon the minutes thereof; which order, with the endorsement thereon, is in the words and figures as follows, to wit:

"Upon the entry of the decree in this cause, rendered on the 30th day of November, A. D. 1869, the said defendants, by their counsel, applied to the court for an appeal from said decree, which was allowed, upon the condition that the said defendants, or some responsible person for them, entering into bond in the sum of $1,000, which bond was tendered and accepted by the court. And, it now appearing that there was an omission in not entering an order allowing the said appeal, the said appeal is here granted to all the said defendants, and the same is here entered, nunc pro tunc, to operate and take effect as of and from the 30th day of November, A. D. 1869, and as fully as if the same had been entered on said day when said decree was pronounced.

(Endorsement:) "Enter. J. J. Jackson, jr., judge, &c."

143 The reports of Special Commissioner Charles Hedrick and Master Commissioner William H. Hogeman, with the exceptions endorsed thereon, referred to in the foregoing decree, are in the words and figures following, to wit:

*Report of Charles Hedrick, sp'l comm'r.*

A. A. THORNTON *vs.* BEVERLY TOMPKINS ET AL. } In chancery in the district of W. Va., at Charleston.

To Hon. John J. Jackson, judge, &c.:

The undersigned, special com'r appointed by a decree made in the above-entitled cause on the 27 of Nov., 1868, and an order made the 30th April, 1869, directing the sale of certain lands and a resale of a portion thereof, respectfully reports that, under and in pursuance of the said order of the 30th of April, he advertised and sold the 300 acres of land in said order mentioned, being the same that was formerly sold to H. C. Dickinson and L. Ruffner, and the sale set aside and a resale ordered by your honor. At the resale, which was made on the 14th of June, 1869, Mrs. R. M. Tompkins was the highest bidder and purchaser at the price of $850 00. She paid in cash, according to the terms of the sale, 10 p'r cent., being $85 00, and executed her three bonds, with W'm H. Tompkins as her security, in equal amounts, at 4, 8, & 12 months from day of sale, with interest from that day. They are

144 each for the sum of $255 00, making, all, $765 00, balance of purchase money. They are herewith filed, marked respectfully 1, 2, & 3. Certified notices of sales, printed in the Ka. Republican, a newspaper printed in Kan'a Co., W. Va., and the editor's receipt for his fee, and also filed, marked No. 4.

Your commissioner cancelled the bond given by H. C. Dickinson & L. Ruffner, heretofore reported, and refunded them the cash payment they had made, according to the last order in said cause, and the receipts of said Dickinson and Ruffner are herewith filed, marked No. 5. He collected of W'm H. Tompkins the expenses of the first sale of the 300 acres, which he, said W'm H. T., was required to pay. This was $9 50.

Your com'r subjoins a full statement of the receipts and expenditures on sales made by him under both orders, by which it will be seen there is now in his hands in cash the sum of $20 88.

| | | |
|---|---|---|
| To cash payment rec'd of Dickinson & Ruffner | | $42 50 |
| " " " " " Eartham | | 11 20 |
| " " " " " Thompson | | 4 50 |
| " " of W'm H. Tompkins, expenses on acc't of resale | | 9 50 |
| " " " Mrs. Tompkins, 10 per cent. on her purchase | | 85 00 |
| | | $152 70c. |
| 145 By com'r costs—resale | 9 50 | |
| " refunded Dickinson & Ruffner | 43 20 | |
| " paid printer | 35 25 | |
| " com's on last sale, 26 00; crier, 5 | 31 00 | |
| " " " sale to Eartham, 5 60; Tompkins, 2 27 | 7 87 | |
| " crier of these sales | 5 00 | |
| | | 131 82 |
| | | $20 88 |

Your com'r has not collected anything on the deferred payments due from Thompson & Eartham. Those claims are perfectly good. The amount as yet due are very small and are drawing interest, so he deemed it not worth while to sue on them until more is due, when he will sue for them, if necessary. One of Mrs. Tompkins' bond is due, but the sale to her has not yet been confirmed and no order has been made directing its collection.

Your com'r, referring to his former report, respectfully submits the above.

C. HEDRICK,
*Sp'l Comm'r.*

*Report of Commissioner W. H. Hogeman.*

ALFRED A. THORNTON *against* BEVERLY TOMPKINS & AL. } In chancery.

COMMISSIONER'S OFFICE,
*Charleston, W. Va., January 7th,* 1869.

To the honorable John J. Jackson, jr., judge of the United States
146 district court for the judicial district of West Virginia, held at Charleston:

Pursuant to a decree made and entered in the above-entitled cause on

the 27th day of November, 1868, in the United States district court for the judicial district of West Virginia, held at Charleston, referring said cause to the undersigned, a master commissioner of your honor's court, to report certain matters therein mentioned, the undersigned gave notice, by publication for four successive weeks in the Kanawha Republican, a newspaper published in Kanawha County, W. Va., of the time and place of taking the accounts required by said decree, in which notice the 7th day of January, 1869, and his office aforesaid, was fixed as the time and place of executing the decree above mentioned, at which time and place your commissioner was present, and, at the request of Samuel A. Miller, esq., counsel for Beverly Tompkins, adjourned all proceeding herein to January 13th, 1869.

On January 13th, 1869, pursuant to adjournment of January 7th, 1869, the taking of said accounts was commenced at my office, and, being unable to complete the said accounts on Jan'y 13th, 1869, I adjourned all further proceedings herein until Jan'y 19th, 1869.

On January 19th, 1869, I continued the taking of said accounts, but, being unable to complete the same on that day, the proceeding
147 herein were again adjourned to January 28th, 1869, on which day I resumed proceedings in this cause, but, being unable to complete the same on that day, all proceeding herein were again adjourned to February 10th, 1869. On February 10th, 1869, I adjourned all proceedings herein to February 24th, 1869. On February 24th, 1869, I again adjourned proceedings herein to February 27th, 1869. On February 27th, 1869, I again adjourned proceedings herein to March 6th, 1869, and, on March 6th, 1869, pursuant to the adjournment last mentioned, of which the parties interested were duly informed, I resumed the taking of said accounts, as follows:

Being required to take, state, and report and account, in conformity with the principles settled by the decree aforesaid, of the advancements made by the executrix of W'm Tompkins, deceased, to Beverly Tompkins prior to May 28th, 1860, that being the first day of the May term, 1860, of the circuit court of Kanawha County, and being required, in ascertaining these amounts, to regard the accounts filed with the answer of the defendant R. M. Tompkins to the amended bill as prima facia correct as to dates and amounts; and, no proof being offered by the complainant or defendants tending to change the dates or amounts of the advancements in said accounts mentioned, I find that the said Rachel M. Tompkins, executrix of the will of W'm Tompkins, de-
148 ceased, from the time of the death of the said W'm Tompkins made advancements to Beverly Tompkins in the manner and sums and at the times following, to wit:

| | | |
|---|---|---|
| 1858, Jan'y 29. | By account marked (2,) filed with the answer of R. M. Tompkins and signed by her, it appears that, on January 29th, 1858, a settlement took place between Beverly Tompkins and R. M. Tompkins, when a balance was ascertained to be due R. M. Tompkins amounting to | $900 00 |
| | By account marked (3,) filed with same answer, I find the following items charged to Beverly Tompkins: | |
| 1858, May 20. | To 520 lbs. meal, 1¼; June 19, 225 do., 1¼ | 9 87 |
| " Sept. 29. | " 27 bushels of wheat | 27 00 |

| | | | | |
|---|---|---|---|---|
| 1859, Ap'l | 9. | " 3 brls., 25; 6¼ bu. corn, 87½ .... | 6 00 | |
| " " | 27. | " B. S. Thompson, your order.... | 265 54 | |
| " Dec. | 3. | " cash ..... | 200 00 | |
| 1860, Jan'y | 18. | " paid Vickars am't of your note. | 1,118 85 | |
| | | | $1,627 26 | 1,627 26 |
| | | | | $2,527 26 |

By account marked (3,) it appears that Beverly Tompkins is entitled to a credit on the advancement, as follows:

| | | | | |
|---|---|---|---|---|
| 1858, July | 9. | By 165 lbs. coffee, 15; bbls., 25; 224 sugar, 8 ..... | 44 52 | |
| " " | " | " goods, 2 87; J. & J. Seashoal's note, 14 13 ..... | 17 00 | |
| " " | " | " cash, 3 00; one wagon, 80 00... | 83 00 | |
| | | | | 144 52 |
| | | | | $2,382 74 |

149 And, being required by the decree aforesaid to further report whether such advancements, made as aforesaid, are in excess of Beverly's share of the personalty of the estate of W'm Tompkins, deceased, I report that I find the personal estate of which W'm Tompkins died seized and possessed as follows:

And, being unable to complete this report on the 6th day of March, 1869, I adjourned all further proceedings herein to Tuesday, the 9th day of March, 1869, on which day I resumed the said account and took the deposition of W'm Tompkins, filed herewith, and then again adjourned further proceeding herein to the 18th day of March, 1869.

| | |
|---|---|
| A debt due W'm Tompkins by Job English and George H. Warth, amounting to ..... | 3,200 00 |
| A debt due W'm Tompkins by M. McArthur, of Covington, Ky., which, according to the testimony of W'm Tompkins, realized ..... | 6,000 00 |
| A debt due W'm Tompkins by W. D. Shrewsbury, being bonds executed to A. Donnally and sold to Tompkins and Welch. The share of Tompkins was about..... | 3,000 00 |
| A debt due W'm Tompkins by D. J. W. Clarkson to W'm Tompkins, which Ja's M. Laidley assumed to pay, and afterwards did pay, amounting, at time of W'm Tompkins' death, to ..... | 6,000 00 |
| 150 A debt due W'm Tompkins by John P. Hale, the amount of which, at the time of W'm Tompkins' death, I did not ascertain, on which has been paid to the estate.. | 12,400 00 |
| Numerous other debts due to W'm Tompkins at the time of his death, the particulars of which I did not ascertain, but which the agent of the executrix, in his deposition, estimates to have realized, in the aggregate, about..... | 34,000 00 |
| Another debt in addition to the above, due by F. A. A. Cobbs, and secured by trust deed, dated Jan'y 2, 1854. On October 24th, 1859, the salt property by which the debt was secured was sold by the trustees. Mrs. Tompkins, as executrix, became the purchaser, bidding $11,075 00. The amount of the debt on the day of sale was $12,263 28. | |

| | |
|---|---|
| The trustees' fees and costs of sale amounted to $215 25, which, deducted from the amount bid, left to be applied on debt | 10,859 75 |
| A debt due W'm Tompkins by Mrs. Putney, costing of three notes of $316 66 each, with interest thereon from July 29, 1854. These were paid up in full in 1867. At the time of W'm Tompkins' death the indebtedness amounted to | 1,150 00 |
| | $76,609 75 |

The defendant R. M. Tompkins has laid before me an account showing the "amount of debts paid by her as executrix of W'm Tompkins, deceased, and due by the estate at the time of his death, and expenditures for the benefit of the estate and heirs and devisees." This account, amounting to $60,853 91, is duly proved by the deposition of W'm Tompkins, and is filed herewith, marked "R. M. T.," and made hereof. With the exception of the item of $9,000 00 for rebuilding furnace in 1860, charged therein, this account should be deducted from the foregoing report of the personal estate of which W'm Tompkins died seized.

My reasons for excluding the $9,000 00 aforesaid are as follows:

1st. The expenditure was not for a debt due by W'm Tompkins at the time of his death.

2nd. It was made upon property acquired by the estate long after Mr. Tompkins' death.

3rd. The furnace upon which the $9,000 00 was expended after 1860, yielded a large annual rent to the estate, which is not included in the account of $76,609 75. The profits of the furnace should be applied to the cost of repairs: at any rate, one should be set off against the other.

4th. The debt was not contracted until after the death of W'm Tompkins.

| | | |
|---|---|---|
| The amount of personal estate proved is | | $76,609 75 |
| The amount of debts, &c., including interest to date of payments paid by executrix, according to acc't "R. M. T.," is | $60,853 91 | |
| Deducting from this | 9,000 00 | |
| Would leave to be deducted from schedule of personal estate | | 51,853 91 |
| | | $24,755 84 |

I report that the personal estate of W'm Tompkins, dec'd, after the payment of his debts, amounted $24,755 84. There are eight equal heirs of W'm Tompkins, deceased. Out of this amount each of these heirs would be entitled to $3,094 48. The amount advanced to Beverly Tompkins before May 28th, 1860, was 2,382 74. Balance due Beverly Tompkins on May 28th, 1860, out of personalty, $711 74. I report, therefore, that the advancements made by the executrix of W'm Tompkins, deceased, to Beverly Tompkins, prior to the first day of the term of the circuit court of Kanawha County, held in the month of May, 1860, are not in excess of Beverly Tompkins' share of the personalty of the testator's estate. If, however, in the opinion of the court the $9,000 00 aforesaid was erroneously excluded, and should be deducted as the other items in the account mentioned, the statement of

the personal estate of which W'm Tompkins died seized would be as follows:

| | |
|---|---|
| The amount of personal estate proved is | $76,609 75 |
| The amount of debts, including interest to date of payments paid by executrix, according to acc't "R. M. T.," is | 60,853 91 |
| | 15,755 84 |

I report, in that case, that the personal estate of W'm Tompkins, deceased, after the payment of his debts, amounted to $15,755 84.

There are eight equal heirs of W'm Tompkins, deceased. Out of this amount each of the heirs would be entitled to $1,969 48.

| | |
|---|---|
| 153 The amount advanced to Beverly Tompkins before May 28, 1860, was | $2,382 74 |
| Beverly's share of the personalty amounted to | 1,969 48 |
| Advanced to Beverly in excess of his share of personalty | $413 26 |

I report, in that case, that the advancements made by the executrix of W'm Tompkins, deceased, to Beverly Tompkins, prior to the first day of the term of the circuit court of Kanawha County, held in the month of May, 1860, was in excess of Beverly Tompkins' share of the personalty of the testator's estate, and that the amount of such excess was $413 26.

And, being unable to complete this report on this day, I adjourn all further proceedings herein to March 19, 1869, on which day I resume the making of this report.

The defendant Beverly Tompkins has laid before me a receipt, dated , 186 , signed by John Slack, jr., sheriff of Kanawha County, W. Va., and acknowledging satisfaction of an execution issued by the clerk of the circuit court of that county, on a judgement obtained in that court in favor of Anderson A. Rock, who sued for the use of W. T. Vintroux and against Beverly Tompkins, and which judgement is reported by Commissioner Laidley, in his report in this cause, to be a lien upon the property of Beverly Tompkins. At the request of Beverly Tompkins, I report that the said judgement has been fully paid,
154 and the lien reported as aforesaid discharged.

And not being required to report any other matters either by the decree aforesaid, or the parties to this suit, this report is respectfully submitted.

W'M H. HOGEMAN,
*Master Commissioner.*

| | |
|---|---|
| Commissioner's fees | $40 00 |
| Printer's fee | 10 25 |
| | $50 25 |

By agreement of the counsel of the respective parties, made before the undersigned, it was agreed that no objection would be made to the taking up of this report by the court, for the reason that the same had not been filed in the office of the clerk of the court for thirty days.

W'M H. HOGEMAN, *Comm'r.*

*Exceptions to report.*

This report, and everything thereof, is excepted to by the def'ts Swann and wife, and by all the other def'ts, by counsel.

T. B. SWANN,
*For self, and counsel for all def'ts in interest with him, and for B. Tompkins.*

155 The exhibits referred to in the foregoing report are in the words and figures following, to wit:

*Deposition of W'm H. Tompkins.*

Deposition of W'm H. Tompkins, taken before me, W'm H. Hogeman, a master commissioner of the district court of the United States for the district of West Virginia, in the chancery suit of A. A. Thornton against Beverly Tompkins & al., on the 9th day of March, 1869.

Present, N. Fitzhugh and Samuel A. Miller, esq'r, of counsel for defendants, and Charles Hedrick, esq'r, of counsel for claimant.

WILLIAM H. TOMPKINS, a witness of lawful age, being by me first duly sworn, deposes and says:

First question by defendants' counsel. State if you have acted as agent for your mother, Mrs. Rachel M. Tompkins, in the transaction of her general business, and especially in the transaction of the business connected with the administration of your father's estate?

Answer. I have.

Second question by same. Take the account filed with this deposition, marked R. M. T., purporting to embrace the amount of debts paid
156 by Mrs. R. M. Tompkins, ex'r of W'm Tompkins, deceased, and due by the estate at the time of his death, and expenditures for the benefit of the estate and heirs and devisees, and say whether the said account and the several items thereof are correct.

Answer. I am satisfied, from the information I have, that the account is substantially correct.

Third question by same. Were the amounts, charged in the said account, paid and expended by your mother, as the executrix of the estate of W'm Tompkins, deceased, for the benefit of the said estate, and for the education of the children?

Answer. Yes.

Cross-examination:

First question by complainant's counsel. I see an item of $9,000 00 for rebuilding furnace in 1860; was that a debt against your father's estate at the time of his death?

Answer. At the time my father died, the furnace was in the name of F. A. A. Cobbs, now dec'd. He, Cobbs, owed a large debt on the property, and in 1858 or '59 was sold by C. Hedrick and J. N. Smith, trustees, and was bought by executors of W'm Tompkins. The furnace ceased running in Dec., 1857, and when idle, as is always the case with salt property, the property went to ruin. Its chief value was and is as a salt property; and to make it a paying property, the $9,000 00
157 was expended. Without a furnace the property would not more than pay taxes.

Second question by same. What were the hire of negros, from the time of your father's death up to 1861, and the rents of the real estate up to that time, worth per annum?

Answer. There were about 50 negroes, old and young, large and small, many of them children, that were a burden, and several superannuated and crippled negroes, that were also a tax; all had to be clothed and fed: and I would not, and my opinion is, no one would have taken the lot and fed and clothed them, paid taxes and medicinal bills, and given over $500 p'r year for them from 1857 to 1861. The executrix and family resided on the Cedar Grove property, and it may have been worth $1,000 00 p'r annum, and Valcoulon farm was probably worth $1,500 00 p'r year, but I know this amount was not rec'd by executrix in cash. The Mason County farm rented for $350 00, and furnace from 1st Aug., 1860, to 1st Jan., '61, rented for 1,900$ p'r year, and taxes to be paid out of the rents.

Third question by same. Were there any other debts due the estate of W'm Tompkins, dec'd, at the time of your father's death than
158 those mentioned in the depositions of Hedrick, Hale, and Laidley, in this case?

Answer. There were.

Fourth question by same. State what they were, and the amounts.

Answer. In addition to the debts spoken of by Hedrick, Laidley, and Hale, there were nearly thirty-four thousand dollars received. The debt against McArthur, spoken of by Mr. Hedrick, only realized about six thousand dollars. I do not think the debt spoken of by Mr. Laidley amounted to more than $5,500 00 at the time of my father's death.

4th by same. State if the amount of the items in the account you have testified to, include interest to the dates given to them.

Answer. Most of them, down to the item of rebuilding furnace, did include interest, but not all.

5th by same. What *what* was the value of the rents, issues, and profits of the real estate after the year 1860?

Answer. The Mason County farm was the same as before 1860. The furnace, up to close of 1865, after paying, yielded about four thousand or forty-five hundred dollars. The Cedar Grove property was destroyed by the federal army, as far as they could destroy it, and yielded nothing after 1860. But little was done in the way of farming after 1860
159 to close of war, and then one or two years' labor was necessary to put the place in order before anything was realized. The Vancoulon place was rented to B. Tompkins according to ac. filed, but out of this, taxes were paid. Large losses were sustained during the war by army taking cattle, hogs, horses, hay, corn, flour, and every species of property on a farm, for which no pay was ever received. Fences were destroyed and fields grew up in briers, &c., requiring large expenditures of money to rebuild fences and put the farms in order.

And further deponeth saith not.

W'M H. TOMPKINS.

EXHIBIT "R. M. T."

"Amount of debts paid by Mrs. R. M. Tompkins, ex'x of W'm Tompkins, dec'd, and due by the estate at the time of his death, and expenditures for the benefit of the estate and heirs or devisees.

1857.

| | | | $. Cents. |
|---|---|---|---|
| June | | P'd H. Farley | 3,200 |
| " | 10. | " F. A. A. Cobbs' note in bank | 502 50 |
| " | 30. | " 3 bonds to J. Lewis | 3,180 |

| | | | | |
|---|---|---|---|---|
| July | 18. | P'd B. K. Va. note | 4,500 | |
| | | " " " " | 2,602 | 53 |
| Dec. | | " security for F. A. A. Cobbs | 3,200 | |
| | 1858. | | | |
| Jan. | 20. | " J. G. Stevenson | 269 | 10 |
| Feb. | 1. | " D. Wilson | 761 | |
| " | " | " W. A. Quarrier, att'y Rooke & Hill | 683 | 09 |
| | 2. | " Morgan Moore | 160 | 27 |
| 160 | 1858. | | | |
| | 24. | P'd Mrs. E. Stanley | 170 | |
| " | " | " Morris Hansford | 1,381 | |
| May | 8. | " F. Hudnall | 150 | |
| " | " | " Dr. S. Patrick | 100 | |
| " | 21. | " Ja's L. Fry | 100 | |
| Aug. | 16. | " Parks & Mosely | 50 | |
| Dec. | 22. | " T. J. Buster ⅓ Holland's notes, security W. D. Shrewsbury | 408 | 39 |
| | 1859. | | | |
| | | B. Proctor | 134 | |
| | | R. D. Clark | 409 | 18 |
| March | 23. | Com. Laidley taking dep. | 24 | 25 |
| " | 30. | W. A. Quarrier, com. dividing lands | 50 | 16 |
| April | 6. | Mrs. D. Childress | 296 | 15 |
| July | 15. | A. Parks | 50 | |
| | " | J. Patchell | 143 | |
| Sept. | 1. | G. W. Summers | 50 | |
| Nov. | 16. | W. A. McMullen | 515 | |
| " | 24. | J. N. Smith | 100 | |
| " | 29. | W. W. Grinslead | 1,750 | |
| | 1860. | | | |
| Feb'y | 1. | E. S. Jarrett | 540 | |
| | | Adm'rs L. Welch | 462 | 70 |
| | | Parks & Mosely | 100 | |
| May | 15. | M. Saturn | 499 | 15 |
| June | 20. | Mrs. Banister | 50 | |
| | | Smith & Son | 56 | |
| Nov. | 9. | N. Fitzhugh | 50 | |
| | | N. Stanly | 745 | 12 |
| | | Clerk's fee bills | 54 | 09 |
| | | " Mason Co | 41 | 96 |
| 161 | | Clerk's Kan. fee bill, 1860 | 29 | |
| | | Mrs. Prather | 150 | |
| | 1862. | | | |
| June | 2. | J. Tompkins, Ky | 50 | |
| | | Mrs. Hill | 517 | 29 |
| | | " " Jan., 1867 | 1,620 | |
| | | " " do. | 1,100 | |
| | | P. Crowder | 1,200 | |
| | | L. J. Woodyard, 1860 | 3,500 | |
| | | J. B. Smith | 8,700 | |
| | | G. W. Summers | 1,700 | |
| | | John Thompson, in full | 1,208 | 87 |
| | | T. J. Buster | 172 | 97 |
| | | Cl'k Kan. Co. | 69 | |
| | | G. W. Spruce for J. Thompson | 298 | 14 |
| | | Rebuilding furnace in 1860 | 9,000 | |

| | |
|---|---|
| Monument | 1,000 |
| Expended in educating children after W'm Tompkin's decease | 3,000 |
| | $60,853 91 |

The following is a copy of depositions taken and filed in this cause:

*Depositions of complainant's witnesses.*

U. S. dist. c't.

A. A. THORNTON *ag'st* BEVERLY TOMPKINS & AL. } In ch'y.

Depositions of Charles Hedrick, James M. Laidley, and Dr. John
162 P. Hale, witness for compl'ts, taken in the above-entitled cause before the undersigned, a master commissioner of the U. S. district court, at Charleston, W. Va., pursuant to notice published in the Kanawha Republican, and a copy of which is herewith filed, on the *the* 28th day of January, 1869, at my office in Charleston.

Present, Cha's Hedrick, att'y for compl't.

CHARLES HEDRICK, being first duly sworn, deposes and says:

Question by compl't's counsel. State if you know of any debts due to W'm Tompkins at the time of his death.

Answer. I know of a debt amounting to about $3,200 00, which was due from George H. Warth and Job English, secured by deed of trust on land in Jackson County. I was the trustee and sold it, I think, about the day after his death; it may have been a day or two before or after; I received the money and paid it over to the executrix. I was commissioner in the suit of Tompkins' executrix ag'st E. Rooke, adm'r of Mrs. Putney. I that case she got a decree for the sale of Mrs. Putney's real estate. The proceeds paid over to her on a debt due to her testator, I think, was near $2,000 00. The amount due at W'm Tompkins' death was, probably, $1,200 00 or $1,500. The amount can
163 be ascertained by reference to the decrees and papers in that case. W'm Tompkins claimed a debt for loaned money on Mr. McCarthy, a half-brother of his, residing in Covington, Ky., amounting, I think, to $10,000 00, with some interest. He claimed to have a lien on real estate in Kentucky and in Cincinnati. What part of it has been collected since his death I do not know. His son William, or his executrix, could tell. There were other large debts due W'm Tompkins at the time of his death, but I can't speak with certainty as to the amount, except one; that was a debt of W'm D. Shrewsbury, being certain bonds executed to Andrew Donnally, now dec'd, and sold by him to W'm Tompkins and Levi Welch, now deceased; as administrator of Mr. Welch, I collected one-half of it, and Mrs. Tompkins, as executrix, got the other half. I think the amount of the whole debt was $6,000 00, with some interest, at the time of Mr. Tompkin's death. Mr. Tompkins owned half of it.

And further deponeth saith not.

C. HEDRICK.

JAMES M. LAIDLEY, being first duly sworn, deposes and says:

Question by compl'ts' counsel. State if you know of any debts
164 due W'm Tompkins at the time of his death.

Answer. I know of a debt of D. J. W. Clarkson to W'm Tompkins, and which was a lien upon the salt property I had bought of the former, and which I assumed to pay in the purchase of said salt property, was upwards of $6,000 00, perhaps $6,500 00, at the time of Mr. Tompkins' death. I have since paid off the entire debt.

JAMES M. LAIDLEY.

And not being able to examine any further witnesses on this day, I adjourned all further proceedings in this cause to Saturday, Jan'y 30th, 1869.

W'M H. HOGEMAN,
*Comm'r.*

On Saturday, Jan'y 30th, 1869, at my office, I resumed the examination of witnesses.

Present, complainant, by E. B. Knight, counsel.

JOHN P. HALE, a witness for complainant, being first duly sworn, deposes and says:

Question by compl'ts' counsel. State if you were indebted to William Tompkins at the time of his death; and, if so, the amount you have paid on said indebtedness to his representatives since his decease.

Answer. I was. I paid, previous to 1862, about thirteen hundred dollars; in 1862, over three thousand one hundred dollars; and in
165 1867, eight thousand dollars in full, for compromise.

J. P. HALE.

And no further witnesses appearing in this cause, all further proceedings in this cause are adjourned to Feb'y, 1869, at my office.

W'M H. HOGEMAN,
*Master Commissioner.*

The following is a copy of a receipt filed in this cause:

*Receipt of sheriff.*

A. A. ROCK, FOR W'M T. VINTROUX, *vs.* BEVERLY TOMPKINS. } Execution from Kanawha circuit court, book 9, page 66.

| | | |
|---|---|---|
| Debt | | 30 37 |
| Interest to Oct. 17th, 1866 | | 9 86 |
| | | 40 23 |
| Cost | | 7 15 |
| | | 47 38 |
| Sh'ff's comp | | 2 37 |
| | | $49 75 |

The above debt was paid me in full by Beverly Tompkins, and he has my receipt, dated, I think, in Oct., 1866.

Charleston, April 12th, 1869.

JOHN SLACK, JR.,
*Late Sheriff Kanawha County.*

166 *Endorsement.*

The debt mentioned in the within was paid Jno. Slack, sheriff, and he he gave me a receipt for the same, which has been mislaid. Said receipt was dated Oct. 18th, 1866.

April 12th, 1869.

B. TOMPKINS.

The following is also a copy of a receipt filed among the papers of this cause:

*Receipt.*

Received of Beverly Tompkins forty-nine dollars and seventy-five cents in full of an execution in favor of Anderson A. Rock, who sued for W'm T. Vintroux as said Tompkins. Said execution from Kanawha circuit court, Oct. 17th, 1866.

JOHN SLACK, JR., *S. K. C.*

The following is also a copy of an account filed among the papers of this cause:

*B. Tompkins to R. M. Tompkins, ex.,*

| | | | Dr. |
|---|---|---|---|
| 1861. | | | |
| Dec. | 31. | To rent farm for 1861, as per contract 13 March, '61 | 1,000 00 |
| | | " int. on same to Dec. 31st, 1866 | 300 |
| 1862. | | | |
| Dec. | 31. | " rent farm for 1862, as per contract | 1,250 |
| | | " int. on same to Dec. 31st, 1866 | 300 |
| 1863. | | | |
| Dec. | 31. | " rent of farm 1863, as per contract | 1,500 |
| | | " int. on same to Dec. 31st, 1866 | 270 |
| 1864. | | | |
| Dec. | 31. | " rent of farm for 1864, as per contract | 1,750 |
| | | " int on same to Dec. 31st, 1866 | 210 |
| 1865. | | | |
| Dec. | 31. | " rent of farm for 1865, as per contract | 2,000 |
| | | " int on same to Dec. 31st, 1866 | 120 |
| 167 1866. | | | |
| | | To rent of farm for 1866 | 600 00 |
| | | | $9,300 00 |

CONTRA.

| | | | | |
|---|---|---|---|---|
| 1861. | | | | |
| June | 3d. | By | this am't, p'd Kirk, ditching | 183 98 |
| Dec. | 15. | " | " " " Geo. Parsons, fencing | 127 35 |
| Dec. | 31. | " | " " " H. Goodwin, plank | 90 |
| 1862. | | | | |
| March | 7. | " | 11 barrels flour, *a* 7 | 77 |
| 1863. | | | | |
| Feb'y | 1. | " | 13 bales, 393 lbs. hay, *a* 55 | 21 61 |
| 1864. | | | | |
| Nov. | 7. | " | cash to Boone, in Cincinnati | 75 |
| 1865. | | | | |
| Jan'y | 17. | " | do 76 00; cash, $3 | 79 |
| May | 15. | " | do 200 | 2 |
| 1866. | | | | |
| April. | | " | 40 bales, 9,460, hay, at different times | 47 30 |

| | | | |
|---|---|---|---|
| Nov. | By 12 bu. potatoes, *a* 75c..... | 9 | |
| | " this am't credited on rent of place, including proceed sales produce, &c., under landlord warrant.... | 1,200 | |
| | | | 1,912 24 |
| | | | 7,387 76 |

1866.
Dec. 30. To this am't due by B. T. on rent on settl. as per above this day.

B. TOMPKINS.

168 CLERK'S OFFICE OF THE DISTRICT COURT OF THE UNITED STATES,
*District of West Virginia.*

I, Jasper Y. Moore, clerk of the said district court of the United States for the district of West Virginia, do certify that the foregoing is a true and correct transcript of the record and proceedings had in said court in the chancery cause therein heard, wherein Alfred A. Thornton is complainant, and Beverly Tompkins and others are defendants.

In testimony whereof I have hereunto set my hand and the seal of the said district court, at Charleston, the 7th day of January, in the year one thousand eight hundred and seventy.

[SEAL.] JASPER Y. MOORE,
*Clerk U. S. D. C., D. W. V.*

Clerk's fee for record, $74 50.

169 To the Hon. J. J. Jackson, judge of the district court of the United States for West Virginia, now in session at Charleston, West Virginia:

Your petitioners, Rachel M. Tompkins; Beverly Tompkins, & Sarah, his wife; William Tompkins; John C. Brown, & Virginia, his wife; T. B. Swann, & Mary, his wife; O. A. Patten, & Ellen R., his wife; H. Preston Tompkins; J. Grant Tompkins, heretofore an infant, by T. B. Swann, his next friend; Lena, Willie, Carrie, Clarence, & Clifton Tompkins, infants, by their next friend S. A. Miller, & H. P. Tompkins, trustee, and N. Fitzhugh, trustee, respectfully represent unto your honor that they are aggrieved by a final decree of the district court of the United States, held at Charleston, West Virginia, at the fall term, 1869, in a cause pending in said court, in which Alfred A. Thornton is comp't, and your petitioners are def'd'ts.

Your petitioners pray that the said decree be revised, reversed, and set aside for errors apparent upon the face of the record, and for an appeal and general relief therefrom for the following reasons:

On the 29th of April, 1857, William Tompkins, of Cedar Grove, made his last will; he gave to his wife, Mrs. Rachel M. Tompkins, all of his estate, real & personal, for the period of her natural life, remainder
170 to their children. The estate was large for the section in which he lived. He authorized his wife to live in such style as she thought proper. He authorized his wife, whom he made whole executrix, without security, to use, sell, and reinvest the personal estate as he would if in life. He directed his children to be liberally educated, and requested that no child should be charged with its expense of its education. In the third clause of the will the testator directed the executrix

to make such advancements to the children, from time to time, as she should think best for them, in land, money, or slaves, or either, and make and execute any necessary conveyances; but each advancement should be charged to the child that received it, so that an equitable and equal division be made at or after her death among all the children or their heirs. He gave to his wife the sole control of his estate during her life, and made her the guardian of the children.

The testator died shortly after he made his will, and his wife
171 qualified as his executrix. The personal estate consisted of a large number of slaves, moneys, and securities. The estate was large enough to give to the children credit. Beverly Tompkins, one of the children, married young, and married a lady who had some expectation of fortune herself He contracted debts, received from the estate large advancements in personal property, and, after a period of some eight years, became embarrassed and indebted, and, among others, to comp't Thornton, who recovered judgment against him for something over $2,000, which was docketed on the 30th of March, 1864. That on 20th of April, 1867, all the children, but J. Grant Tompkins, then near his majority, having arrived at full age, with Mrs. R. M. Tompkins, the life tenant, came to terms of settlement and adjustment among themselves, which resulted in that equal and equitable division of the estate which had been contemplated by the will, which was effected by a petition deed among themselves.

All the advancements were fully considered. It was found that Beverly Tompkins had received from the executrix advancements in personalty nearly equal to his entire share and interest in the estate
172 of his father. He accepted for the residue of his interest a tract of land set out in the deed. He had a large family of young children, suddenly reduced from comfort to want, and his brothers & sisters and their husbands settled upon his wife and children a home from their portions of the estate. This act will receive different interpretations from minds differing in cultivation and taste. If the property was theirs, they had a right to keep or give it. An act of generosity may be a mistake, but cannot be a fraud. This division deed is an entirety of contract, and as such must stand in all its parts, or must be set aside toto selo. In this state of things, Alfred A. Thornton filed his bill against the executrix and devisees of William Tompkins, to subject Beverly Tompkins' interest in the estate of his father and in his wife's estate to the payment of his debts. He states that the will had clothed the executrix with power to advance the children in land or money, but charges that the advancements made to Beverly were not justly stated in the division of 20th of April, 1867. It denies to the executrix
173 power to advance one child in any one species of property more than she advanced all the children in property of that kind. It claims, as a just construction of the will, that each child should receive the same advancements in lands, slaves, and money. It charges that if the said Beverly was advanced in personalty beyond one-eighth part of the personalty of the estate, the excess must fall as a loss upon the other children, and not upon Beverly or his creditors, as to a supposed vested interest of $\frac{1}{8}$ part of the lands.

Mrs. Tompkins answered the bill. She states that she never heard comp't's' judgment against Beverly until after the partition of the estate, 20th of April, 1867; that Beverly was her oldest child, married young, and commenced receiving large and frequent advancements soon after the death of Mr. Tompkins, in personal property; that she thought it right to make them under the will of her husband, whose wishes it was

her desire to carry out, and that they were just and correct, and they exceeded $18,000, but by mistake in dividing the property, they had been put down at $17,000, and that the 300 acres of land deeded
174 to Beverly made up his full share of the estate. He accepted it in a deed which he had a right to enter into, and acknowledged the advancements he had received.

In an amended bill the said Thornton charges that the deed of 20th of April, 1867, was made with purpose to defraud him; that the estate did not own the lands conveyed to Beverly, and that Beverly had not received the advancement of $17,000; that Beverly had been advanced in personalty little more than the other legatees. It attacks the gift to Beverly's wife and children as a fraud—as item of fraud; it states that seven of the children purchased the eighth, Charles', interest, in 1866, for $25,000. This may have been a good bargain for Charles, but certainly is no badge of fraud. Mrs. Tompkins' answer shows that in reality Charles got less than $16,000. The answers show that there were 300 acres conveyed to Beverly. They show the character of the division, and the reasons which led to it. They deny all fraud, and show that the division was just. Mrs. Tompkins' answer shows how Beverly had been advanced. They show how the provision had been made for
175 Beverly's wife and children. Mrs. Tompkins retained, by *by* contract with the children, not more than sufficient for a comfortable support, far less than was contemplated by the will, which authorized her to live in any style she pleased. The bill charges that the land settled upon Beverly's wife and children were liable for his debts. By the decree of 1868 the court charged the lands of the other legatees with the debts of Beverly Tompkins, and disregard the advancements made to him by the executrix, some $16,000, after the rendition of the first judgment against him. The court ordered the 300 acres assigned to Beverly to be sold for comp't's' debt, disregarding the lien created by the deed upon the same for the payment of the bond of $11,300 to Charles C. Tompkins. The cause was sent to a commissioner to report all judgments against Beverly. He reported $7,937 42c. Not regarding the other children as purchasers from Beverly in the deed of 20th of April, 1867, he reported all judgments as liens upon the land. The record shows that a large portion of this indebtedness was docketed after the 20th of April, 1867, and some not at all. At the November term,
176 1869, the court confirmed the sale of the 300-acre tract, and not at all regarding the advancements made to Beverly in personalty, ordered the lands assigned to Mrs. Tompkins and those assigned the other children of W'm Tompkins to be sold for the payment of Beverly's debts, and appointed com'rs to execute the decree. By this decree the petitioners regard themselves aggrieved, and from its provisions they respectfully appeal and pray for relief.

It will be seen that Com'r Hogerman report of the personal estate, instead of allowing Mrs. Tompkins to live as the will contemplated and wished she should, cuts her off from all the enjoyment of the personal estate, to one-third of which she would have been entitled in fee without a will. If Mrs. Tompkins under the will had a right to make advancements at all, she had a right to make them either in real or personal property, and any child had a right to receive advancements in either real or personal property to the extent of his full interest therein.

The court cannot maintain the deed of division and attach additional burdens not therein assumed. If the court can compel the children to pay $1,600 apiece to Beverly's creditors, it can exhaust their in-
177 terest *interest*. The other children, innocent in the advancement

made by the executrix, and having received no more than their father intended they should receive, may be reduced under the creditors imposed by the court to want. If there be any wrong it cannot be with the children, who did not receive from the estate more than their dues. The will contemplated an equal division, and that was the intention of the deed. The decree will give to Beverly Tompkins and his wife and children and creditors nearly two full interests in the estate.

It is suggested that the advancements made to Beverly were in money and slaves, and not in land. The difference is not perceived. Neither the executrix nor the other children were advised of the degree of Beverly's embarrassments. The only legitimate question before the court is, Did Beverly Tompkins receive his just share in the estate? And if so, neither he nor creditors claiming under him have further demands upon it. Certainly these parties had a right to come together and fairly divide their own property among themselves. The courts do not invite the pleasure of the task, and the courts will presume the division
178 just until the contrary is proven. The fact that one of the parties was indebted cannot affect the rights of the others. Under the will whatever Beverly had left was liable for his debts. If he had received from the estate in excess of his just proportion, certainly there was nothing left for creditors without taking from the other children, and disturbing the equality contemplated in the will. The provisions of the will in its claim are paramount to the rights of creditors of any child claiming under it. But for the will Beverly Tompkins might not have property. Neither he nor his creditors can claim both under and against the will. If they claim under the will, they must respect all its provisions, and aid in enforcing among all the children that perfect equality it ordered.

The will gave Beverly Tompkins property, and if the creditors trusted him upon the faith of that property they knew they could only enforce the collections of their debts against him subject to the provisions of the will. They allowed him to receive large advancements of personalties from the executrix and better his condition to pay his debts. Now
179 they seek to throw the loss upon the innocent while they slept. They neither resorted to suggestion or injunction to arrest the ordinary powers of the executrix. It is not pretended that the estate is liable to any but the judgment creditors of Beverly Tompkins. Suppose Beverly had been advanced his full share in the estate in land, and had sold it before there were judgments, would his creditors have any claims against the personalty of the estate? Was the executrix compelled to administer the estate to suit the creditors of the children? Was she to consult the Shylock & the gambler? Suppose there had been large judgments against all the children, then, upon this theory, she could not have administered the estate at all, but would have been forced to submit her powers to courts, and the intention of the testator would be defeated. It was never his intention that the executrix should look up the debts of the children; to do that was no part of her duty. These creditors cannot exact from her duties not imposed by the will, nor have they a right to exact gratuities and contributions from the children, and defeat the intention of Mr. Tompkins. If Beverly
180 Tompkins lived above his means, and comp't and others were willing to trust him upon his expectancy, and the events of the war have changed those expectancies, it is not just for the courts to hold the executrix or the other children sureties to make good their hopes. Having made these advancements, it was impossible to restore them to the estate. If Beverly was advanced beyond his just share of personalty, and

then were entitled to participate equally in the lands, his share of the lands would be first chargeable to the other children for the excess of personalty advanced to him, and no creditor could participate in Beverly's lands until this claim was paid. If, by mistake, there was inequality in the advancements of personalty to Beverly, the will ordered that the other children should not be prejudiced thereby. The other children would not have accepted the division of 20th of April, 1867, with the burdens imposed by the decree. It is not believed that the courts of the country can make contracts for the people, and order the marshals to enforce them. If the judgments were docketed the will was recorded.

181 The will gave them such notice of its own intentions that it is not probable that the creditors of Beverly in the *the* first instance expected payment from this source. The claim is not colored with original equity. We are considering what is the will of the testator as to the disposition of all his property among all his children. If that will is clear it must be executed as Mr. Tompkins would execute it were he in life. Suppose during his life judgments had been obtained against one of his children, and he had made to that same child advancements while in life, and the will had directed an equal distribution of the estate, charging the advanced child with the advancements made to him, and that advancement was made in personalty, and equal to an interest in the estate, what would be left of the judgment creditor? Would not the advanced child, seeking a further interest in the estate, be compelled to bring his advancements into hotch pot? Are the rights of his creditors against the estate higher than his own? Is it in the power of the creditor to defeat the intention of the testator? It was as much his wish that his wife should give this property to the children in her discretion as that they receive it at all. He gave her a large discre-

182 tion in advancing the children. In exercising this discretion it was for her in her wisdom to say what character of property was best suited as an advancement for each child, and at what period it was best for him to take. If one were unfortunate and contracted debts, it was best for him to be advanced in that form which would enable him to pay them. Personal property would be best suited to his condition and wants. He would as naturally ask for that, and his mother would as naturally gratify him. Had Mr. Tompkins been in life he would have done the same, and by his will he has clothed his wife with all the discretion, coupled with affection, that he could exercise. But this broad discretion is to be governed by equality in the distribution. Her own wants are so carefully and abundantly cared for that there can be no inducement for the executrix to infringe upon the rights of the children. Still less did he intend that the creditors of one child should defeat his purpose of equal distribution. The duties of the executrix under this will are clearly pointed out in the case of Harrison's Widow vs. Harri-

183 son's Heirs, 2nd Grattan's Va. Rep., page 1; 2nd Ves. Jr., 333 and note. Did not the executrix have the same right to make advancements the testator had? Suppose she had withheld all advancements from Beverly, and had advanced the other children until the lands were exhausted, could Beverly disturb the advancements made to the other children in lands accepted by them, if there were enough personalty left to make him whole? Can creditors dictate what species of property shall be given the children as advancements? Then they can defeat the will, take from the executrix the discretion with which she was clothed, and dispose of the entire estate as and when they please, or arrest all advancements. In this way they overthrow the will. What then becomes of the discretion with which the executrix was clothed?

Affection and discretion yield to gain. The executrix was acting ex mandato, and those dealing with the estate in any form must look to the will. (De Bouchout vs. Goldsmith, 5th Vesey, 210.) The court will not allow the legatee or their creditors to execute the will. (Meredith vs. Hineage, 1 Sim., R. 534 and 542; Wright vs. Adkins, 1 Vesey & Beam, 313.) Every portion of this will points to the executory part as a personal trust, coupled with affection & discretion. This decree makes innocent legatees suffer, who were in no way responsible for the acts
184 of the executrix or their co-legatees. The creditors come into the equity court asserting their demands. They must do equity to all, and to the intentions of the will. Residuary legatees are not permitted to question the disposition which executors make of assets. (1 Mad., Ch'y. 288.) It was obviously not the intention that Mrs. Tompkins should account. The will excludes the idea. It required no security. The refined confidence which it manifests never intended that her acts should be critically reviewed. Certainly the courts will not require an account and reinbursement from her. Nothing but the grossest mismanagement would justify it. Certainly not for errors of judgment, if any exist, in making advancements when her discretion was made her rule of action, and no security was required to make her acts perfect. He knew she was a woman not versed in law. He provided for her errors by entrusting all to her; 'twas his; he had a right to do it; and told her that equity and joint affection, which, dying, he left her as his greatest legacy, was her law.

T. B. Swann, for himself and as counsel for the other petitioners,
185 and R. M. Tompkins, in her own right and as executrix; Beverly Tompkins and Sarah, his wife; William Tompkins; John C. Brown & Virginia, his wife; T. B. Swann and Mary, his wife; O. A. Patten and Ellen R., his wife; H. Preston Tompkins; J. Grant Tompkins, an infant, by T. B. Swann, his next best friend; Lena, Willie, Carrie, Clarence, & Clifton Tompkins, infants, by their next friend S. A. Miller; & H. P. Tompkins, trustee, and N. Fitzhugh, trustee.

30th November, 1869.

A copy. Teste:

JASPER Y. MOORE,
*Clerk U. S. D. C. & D. W. V.*

186 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judge of the district court of the United States for the district of West Virginia, greeting:

Because in the records and proceedings, and also in the rendition of the decree and judgment of a plea which is in the said district court before you, between Alfred A. Thornton, complainant, and B. Tompkins, W'm H. Tompkins, H. P. Tompkins, J. G. W. Tompkins, John C. Brown, and Virginia, his wife; H. P. Tompkins, trustee, & N. Fitzhugh, trustee, O. A. Patten, and Ellen R., his wife; R. M. Tompkins, and Thomas B. Swann, and Mary, his wife; and Willie, Carrie, Clarence, Lena, Clifton, & C. C. Tompkins, infants, by S. A. Miller, their next friend, are defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears; we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together

with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that, the records and proceedings aforesaid being in-
187 spected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court, the seventh day of December, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] Teste: J. B. JACKSON,
*Clerk Circuit Court U. S. District West Va.*

188 UNITED STATES OF AMERICA, *ss:*

To Alfred A. Thornton, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December in the year 1870, pursuant to an appeal allowed by the district court of the United States for the district of West Virginia, wherein B. Tompkins, W. H. Tompkins, H. P. Tompkins, J. G. W. Tompkins, formerly an infant, by T. B. Swann; Jno. C. Brown, and Virginia, his wife; H. P. Tompkins, trustee, & N. Fitzhugh, trustee; O. A. Patten, & Ellen R., his wife; R. M. Tompkins, & T. B. Swann, & Mary, his wife; & Willie, Carry, Clarence, Lena, Clifton, & C. C. Tompkins, infants, by S. A. Miller, their next friend, are plaintiffs, & you are defendant, on appeal, to show cause, if any there be, why the judgment & decree in the said appeal mentioned should not be corrected, & speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jackson, jr., judge of the district court of the United States for the district of West Virginia, this the 10th d'y of December, in the year of our Lord 1869.

J. J. JACKSON, JR.,
*Judge D. C. U. S. D. W. Va.*

189 CHARLESTON, WEST VIRGINIA,
*January* 10, 1870.

We accept service of a copy of the within citation, as attorneys for the defendant in error, A. A. Thornton.

HEDRICK & QUARRIER,
*Counsel for Thornton.*

The above acknowledgement of service of the within citation was signed and acknowledged before me on the 10th day of January, 1870, by Charles Hedrick, esq'r, of counsel for defendant in error of Alfred A. Thornton, in the clerk's office of the district court of the United States for the district of West Virginia, at Charleston.

Teste: JASPER Y. MOORE, *Clerk*,
By H. C. McWHORTER,
*Dep'ty Clk U. S. D. C. Dist. W. V.*

190 Supreme Court United States.

T. B. SWANN & W. H. TOMPKINS & OTHERS, plaintiffs in error,
*vs.*
A. A. THORNTON, DEFENDANT IN ERROR.

Know all men by these presents that we, T. B. Swann & W. H. Tomp-

kins, are held and firmly bound unto Alfred A. Thornton in the sum of one thousand dollars, to be paid to the said A. A. Thornton, his executors or administrators, to which payment, well & truly to be made, we bind ourselves, and each of us, jointly and severally, & all & each of our heirs, executors, & administrators, firmly by these presents, sealed with our seals and dated this 1st day of December, 1869, &c.

Whereas the above-named T. B. Swann & W. H. Tompkins have presented a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above-entitled suit, by the Hon. J. J. Jackson, jr., judge of the district court of the United States for the district of West Virginia:

Now, therefore, the condition of the above obligation is such, that if said T. B. Swann and W. H. Tompkins shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

T. B. SWANN. [SEAL.]
W. H. TOMPKINS. [SEAL.]

191 Sealed & delivered in presence of—

Witness: E. B. KNIGHT.
C. HEDRICK.
BENJ. H. SMITH.

Bond approved.

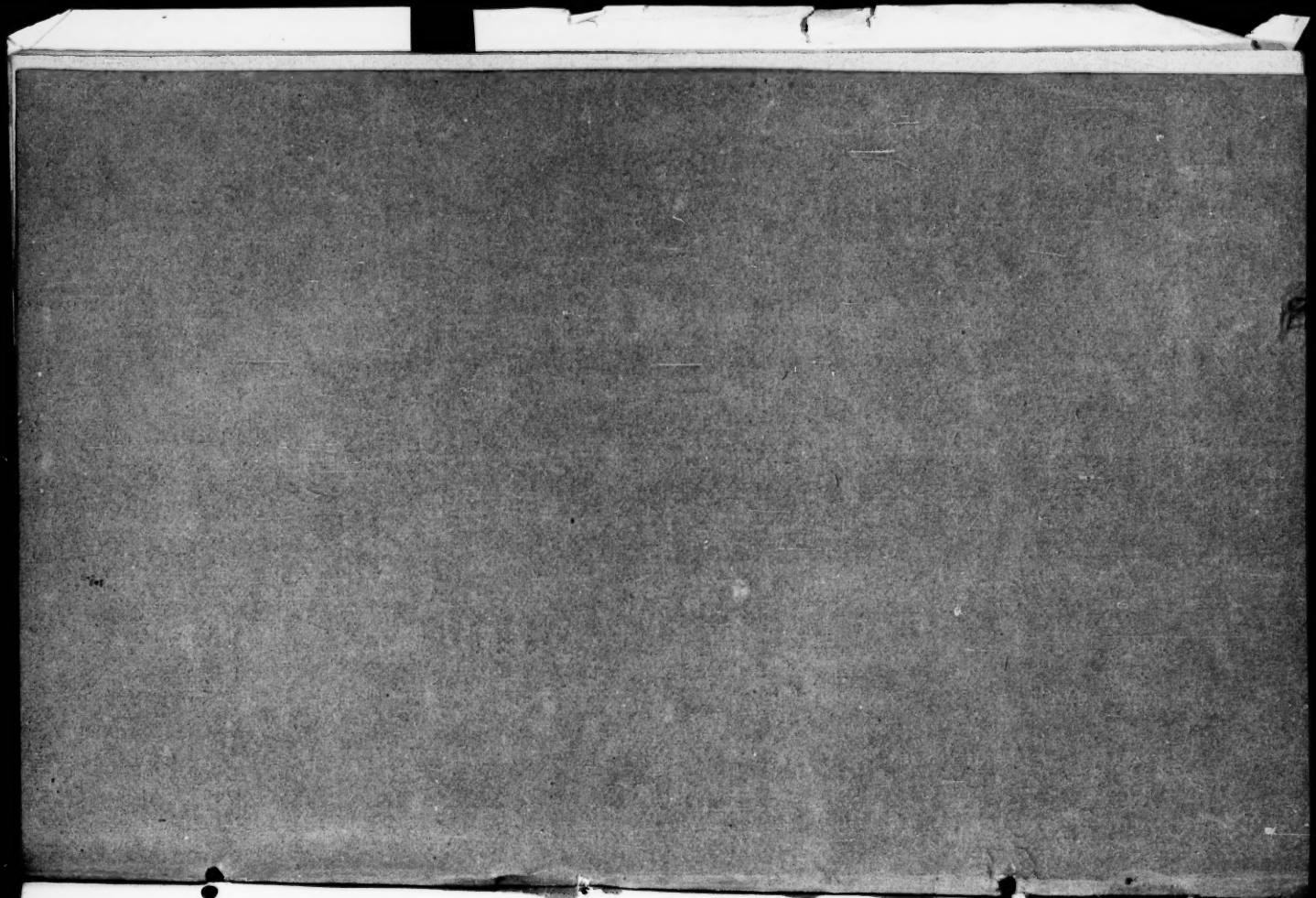
J. J. JACKSON, JR.,
*Judge D. C. U. S. D. W. Va.*

A copy. Teste:

JASPER Y. MOORE,
*Clerk U. S. Dist. Court Dist. W. V.*

(Indorsement on cover:) No. 448. Beverly Tompkins, Thomas B. Swann, et al., plaintiffs in error, vs. Alfred A. Thornton. West Virginia D. C. U. S.

Filed 25th April, 1870.



# Supreme Court of the U. S.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF WEST VIRGINIA.

BEVERLY TOMPKINS AND OTHERS, *Appellants*,
vs.
ALFRED THORNTON, *Appellee*.
} December Term, 1871. No. 39.

BRIEF FOR APPELLANTS.

H. Polkinhorn & Son, prs., D Street, near 7th.

# Supreme Court of the U. S.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF WEST VIRGINIA.

BEVERLY TOMPKINS AND OTHERS, *Appellants*,
vs.
ALFRED THORNTON, *Appellee*.
December Term, 1871.
No. 39.

## BRIEF FOR APPELLANTS.

In 1857 William Tompkins, of Kanawha county, Virginia, now West Virginia, died, leaving a will, (Record page 12,) appointing his widow, Rachel M. Tompkins, executrix and guardian of their minor children. His estate was disposed of by the following clauses, on the construction and effect of which the questions in this case depend:

"*Second.* I give to my much beloved wife, Rachel, all my estate of whatsoever kind, to have and to hold the same during her natural life, remainder to our children; and upon these trusts and conditions that my beloved wife, in whom I have perfect confidence, shall have the sole control of my estate during her life, for her own support and personal expenditure in such style as she shall think proper to live, and for the purpose of educating and maintaining our children and starting them in life: and for these purposes she may, at all times, sell and dispose of any of my personal estate and purchase other, and

make such use and disposition of it as I might during my life-time.

"*Third.* It is my desire that she make such advancements to the children, from time to time, as she shall think best for them, of lands, money, and slaves, or either, and make and execute any necessary conveyances; but each advancement is to be charged to the child that receives it, so that an equitable and equal division may be made at or after her death among all my children or their heirs; but my wife is not to charge to any of my younger children any necessary expenses for their maintainance, or that may be incurred in giving them a good education, until they arrive at the age of twenty-one years."

For ten years the widow administered the estate under the will. Beverly Tompkins, the eldest son, a married man, received large advances each year in money, negroes, rent, etc., aggregating up to December 31st, 1866, $18,138.62. (Record p. 34.)

On the 20th of April, 1867, the executrix joined the children in making such an equitable division of the estate as was contemplated by the will, by a partition deed. (Record p. 4.) In this division the advances by the executrix were, as the will required, treated as advancements. Beverly Tompkins acknowledged by the deed to have received $17,000.00 from the executrix, which was nearly his full share of the whole estate; and there was conveyed to him, in addition, a tract of three hundred acres, valued at $3,000, which he accepted as completing his share, and relinquished all claim on the residue.

The widow and executrix took, in lieu of her life estate, whatever might remain of the personalty, after paying debts; and also certain real estate. (Record p. 8.)

There were eight children, one of whom, Charles C. Tompkins, in 1866, conveyed his share to his brothers

and sisters, (Record p. 25.) At the date of this division he held their bond for $11,355.13, in part payment for the share, one-seventh of which sum they severally acknowledged by the partition deed to be a lien on the share of each of his brothers and sisters. (Record p. 11.)

The deed further recites that the mother and brothers and sisters of Beverly Tompkins who had expended in advance his share of the patrimony, "are willing and desirous of making a settlement and provision out of their several interests and portions in said estate, for the maintainance and support of the wife and children of the said Bevely;" and it accordingly conveys to a trustee for them a farm therein described. (Record p. 7.)

Beverly Tompkins was apparently insolvent from before his father's death to the date of the division. There were ten judgments against him at this latter date, amounting in the aggregate, with interest, to $7,937, rendered from 1860 to 1867, on obligations some of which were incurred as early as 1856. (See appellee's and Vintroux' judgments, Record p. 47.)

Alfred A. Thornton, appellee, one of the judgment creditors, at the March term 1867 of the United States District Court for the District of West Virginia, filed his bill against the widow and heirs, alleging that the executrix had no power to advance to Beverly more than his share of the personalty, and that she had not so advanced him, and asking that one-seventh of the real estate of decedent be set apart to Beverly, subject to the life estate of the widow, and be subjected to the payment of complainant's judgment. (Record, page 2.) The executrix answered, (Record, page 14,) setting forth that her advances to Beverly Tompkins, as shown by the settlement of December 31, 1866, (Record p. 34 to 37,) nearly equalled his interest in the whole estate, and that the residue of the property had been divided by partition

deed as above stated, and Beverly had accepted three hundred acres in full of the balance of his share.

In the amended bill, (Record p. 17,) complainant charges that the alleged advances to Beverly were chiefly fictitious, and the division deed was fraudulently made to convey his just share of the estate to a trustee for his wife and children, so as to place it beyond the reach of his creditors. These charges, together with the several items of alleged fraud set out in support of them, are fully and satisfactorily refuted in the answers of the several defendants, and the exhibits and affidavits filed therwith, (Record p. 28 to 43, inclusive.) The allegations of fraud are not relied on, or even referred to, by counsel in their brief here. The Court below did not allude to them in its decree, but conformed the decree to the account of advancements as sworn to and filed by the executrix.

The Court decreed, (Record p. 44,) that "Beverly Tompkins took an unconditional vested remainder in fee of an undivided one-eighth of the land, and the judgments against him duly docketed prior to the deed of partition were liens on it, to the exclusion of all charges on account of advancements made after May, 1860, when the first of the ten judgments was rendered.

It ordered that the partition should not be disturbed, unless the devisees, heirs *and* executrix, (all of them) so requested; and that the judgments should be apportioned "among the parties who hold under the deed of partition, so that the liens ascertained in this cause shall bind one undivided eighth of each of the parcels of land allotted to the several grantees in said partition deed, except the land allotted to Beverly Tompkins, which the Court is of opinion should be exhausted before the creditors are entitled to go upon the interest of the others;" a special commissioner was appointed to sell the three hundred acres conveyed to Beverly by the partition deed.

This sale produced less than a thousand dollars, leaving a balance of more than seven thousand dollars of judgments and costs unpaid. On the Court ascertaining that the advancements to Beverly, prior to the date of the judgment in May, 1860, had not exceeded his interest in the personalty, a final decree was rendered, (Record pp. 61 to 63,) which confirmed the partition, and directed the undivided one-eighth of all the real estate, (except the three hundred acres conveyed to Beverly, which had already been sold as aforesaid,) to be sold, and the proceeds applied to the payment of the balances of judgments against him.

The error of this decree of which we complain is that it gives Beverly Tompkins and his creditors more than an equal share, and thus defeats a leading provision of the will.

The ruling purpose of the testator was to substitute his widow for him as head of the estate and the family, to rule both throughout her life, without hindrance of guardian, co-executor, or bondsman—guided only by her love and discretion. She was to be unquestioned judge of the style of her family expenditures, of the education of her children, of the advancements proper for the adults. "For these purposes she may at all times sell and dispose of any of my personal estate, and make such use and disposition of it as I might during life."

It was a large estate for that day and county. One of the sons, Beverly, was then of age and in debt. Doubtless he would have been glad to have had his share at once. Instead of giving him all or part of it, the testa-

tor committed the whole subject to the discretion of the executrix in these words of authorization and command: "*It is my desire that she shall make such advancements to the children from time to time as she shall think best for them, in lands, money, and slaves, or either.*"

There is no limit to the authorized advancements, except inferentially in the after clause which requires them to be considered in final division, so that each child might have an equal share of the estate.

There is no requirement that the personalty shall be divided equally, and the real estate equally; but only that each shall have an equal share of the whole.

The widow was given precisely the same choice of the subject matter of the advancements, which the testator would have had if living. She made all advancements to Beverly in personalty. This was to have been expected. It was natural that the eldest son, extravagant, perhaps, and having a family to support, should frequently get from his mother money, notes, servants and stocks—the property of the estate most readily disposed of—and in the course of ten years thus consume nearly all his patrimony. These advances, therefore, were not beyond the reasonable anticipations of the testator, and were authorized by the letter and the spirit of the will.

It was no more clearly the purpose of the testator that his widow should control his estate absolutely during her life, and make the advances she thought proper within the limits of a share, than that, when the residue of the estate should be divided, all these advances should be treated in every respect as if they were advancements made by himself—"so that *an equitable and equal division* may be made at or after her death among all my children or their heirs."

This ruling purpose of the will is defeated by the decree which gives to Beverly Tompkins seven thousand dollars more than an equal portion, by decreeing

that his share as completed by the deed of partition should stand, and then ordering the sale of one-eighth of all the remaining lands to satisfy the balance of judgments against him. (Record p. 62.)

The Court arrive at this result by construing the second section of the will to give to Beverly an *unconditional* vested remainder of one-eighth of the lands. Such would be the effect of that section standing alone; but it does not stand alone and cannot be construed by itself. The third section distinctly qualifies the devise, by the provisions authorizing the executrix to dispose of all the estate, real and personal, and requiring that any residue not so disposed of should be divided, and advancements considered in division.

It is not important to determine what technical phrase best describes the contingent interest of Beverly in that part of the estate remaining at the date of division. The testator's purpose as gathered from the whole will is clear: and, in the language of Chief Justice Marshall, is the "pole star" of the Court in determining rights under the will. He meant *to give the widow the whole estate, real and personal, in trust throughout her life, with absolute power of disposal for designated purposes.* The word "remainder" was obviously used by him, not in its technical sense to indicate the character of the title his children should take, but to designate the property itself—*the residue*, after the expenditures and advancements authorized, should have been made and deducted. But if it be considered, as the Court below and counsel here consider it, a vested remainder, it yet had the condition annexed that it should be burdened with all advancements beyond his share of the personalty. In refusing to give effect to that condition, the Court below disregarded and defeated the provision for equality; made a latter clause yield to a former; a natural, just and strongly expressed purpose, to an unconsidered technicality. "When

the intention of the testator is plain, it will control the legal operation of words however technical." Kip v. Kip, 2 Paine, 366, and note.

In the final decree, (Record p. 62,) the Court, held that advancements of the personalty to Beverly in excess of his interest therein *if made before the first judgment was rendered*, would be a prior lien on his share of the realty. This, in effect, admits our whole case. It could only be by force of the will that advances by the executrix were liens. The judgment lien could only attach to Beverly's interest *as it existed*, subject to the operation of the will and the execution of the powers and trusts under it. The power and duty of making advancements, and charging them in final division, are created and determined by the will: and they cannot be suspended, or their exercise or effect intercepted, by any lien *ab extra*. If the judgments against Beverly were absolute liens on an undivided one-eighth of the lands, then the executrix could not after the first judgment, make an advancement to any of the other heirs in lands, because she could not give clear title. Hence, if the earlier advances are liens prior to the judgments, the latter are also—for it cannot be successfully maintained that the first judgment suspended the chief powers and duties of the executrix, and defeated the ruling purpose of the will, respecting this large family and estate.

The law of Virginia subjecting trust estates to the lien of judgments against beneficiaries, (Rev. Code 1819, page 370, section 30; and Code 1860, page 560, section 16,) is in substance the same as the provision of the statute of frauds, 29 Charles, 2, Ch. 3, 10. The Court of

Appeals of Virginia say: "As to the quality of estate subject to the lien, there is no difference between the statutes." (Coutts v. Walker, 2d Leigh, 280.) Now it has been repeatedly decided under this English statute that there can be no execution on a judgment against the trust estate of the debtor, unless the trust be clear and simple for his benefit alone. He must be *the sole beneficiary.* (Forth v. Duke of Norfolk, 4 Madd., 504; Doe dem Hull v. Greenhill, 4 Barn. & Ald, 690; Harris v. Booker, 4 Bing., 96.) The judgment creditor may in such case go into a Court of Equity and claim satisfaction. But in that event the judgment is held not to be a lien against subsequent assignees for valuable consideration without notice. (4 Maddox, 504, do. 506, note. See also 2d Leigh, 280.) In this case the executrix held the whole estate in trust for a number of beneficiaries. The interest of Beverly could not be taken and sold on execution. For seven years appellee slept on his rights—asking no aid of a Court of Equity to satisfy his judgment—while the executrix was making advancements to Beverly, ignorant of the judgments, (Record p. 15.) Appellee and the other creditors have thus impaired their remedy by their own laches. It would be an unprecedented wrong to make either the trustee, who made the advancements in good faith and in execution of her authority, or the brothers and sisters of Beverly, suffer for this neglect of the creditors to adopt and pursue the appropriate remedy.

But if the judgments and advancements be both held to be liens of equal rank—the first in time being first in right—then the decree is erroneous in this, that it gives full effect as liens to all the judgments rendered after May, 1860, and no effect to advancements made after

that date, but prior to said several judgments. (See dates of advancements pp. 34 to 37, and dates of judgments pp. 46, 47.)

Counsel here, while asking that the decree be affirmed, contradict the reasoning of the Court below by taking the position that the gift to the widow of the personalty, "was absolute, and left nothing to pass by the devise over," and consequently, "so far as she has given money or other personal property to Beverly, it is a gift of her own free will, out of her own absolute estate, and not an advancement under the will." Therefore, "the clause that purports to empower Mrs. Tompkins to make advancements to the children in money or other personal property, is void; it being repugnant to the estate vested in her by the will," (Brief p. 2.) In support of this view, counsel cite authorities the effect of which they sum up in the rule, that "where there is an absolute gift to the wife *to any use she might think fit*, nothing can pass by the devise over."

This is a canon of construction applicable only where the purpose to grant the fee is declared in express terms; or is inferrible from an absolute power of disposal. It is not applicable to this case:

1st. Because the will gives the widow neither the fee nor the power of disposal for any use she may see fit. All her estate in the property she holds as trustee. The purposes for which she may use any part are all distinctly defined—"for her own support and personal maintainance in such style as she shall think proper to live, and for maintaining and educating our children, and starting them in life; and *for these purposes* she may at all times sell and dispose of any of my personal estate," &c. She

had large discretion as to the *amount* required for each branch of the trust; but was not therefore beneficial owner of the personalty. Suppose she had sought to dispose of it to strangers, or to endow a charity. A Court of Equity or Probate on the complaint of the children would, undoubtedly, have restrained or displaced her; which it could not do if she were not trustee, but absolute owner.

2d. Because the testator twice expressly declares in the will that he gives his widow only a life estate. Even though he had given her also the absolute power of disposal, no inference of intention to grant the fee could arise in presence of the repeated declaration that he gave her a life estate only: "Because the estate given is express and certain, and the power of disposal comes in by way of addition."

Thomlinson v. Dighton, 1 Salkeld, 239.
Same parties, 1 Peere Williams, 171.
Jackson v. Robbins, 16 Johnson, 588.
Surman v. Surman, 5 Maddox, 123.
Gibbs v. Tait, 8 Sim., 132.

Indeed the weight of modern, and especially American, authorities is against the rule in cases where, accompanying the grant of a fee or an absolute power of disposal, there is a clear intention shown *in any form of words* to grant a subsequent eestate. Thus in Smith v. Bell, 6 Peters, 69, though the bequest was to the widow of the personalty "*to and for her own use and benefit and disposal absolutely,*" remainder to her son, this Court held unanimously, Chief Justice Marshall delivering the opinion, that the limita-

tion over was effectual. See also Harrison v. Harrison, 2d Grattan, p. 1.

If the advancements in excess of Beverly's share of the personalty were not liens on, or deductible from, his share of the realty, still the decree must be reversed, because it confirms the partition. In that case the deed of partition was made under such mistake of fact, as entitles the widow or either one of several of the heirs to have the contract annulled. She declares on oath that when it was made she had no knowledge of appellees' judgment against Beverly, (Record p. 15,) and other of the heirs make a like declaration, (pp. 40, 41.) Yet the Court decreed that the deed should stand unless *all* the parties joined in asking its cancellation—including Beverly and his wife and children, who profit by the mistake.

THOMAS EWING, Jr.,

*For appellants.*

Indictment Lewis

2 Counts 431

4 " 81

" " 207

(Code 88 - 780 -

Sec 6th -

Transportation of Immigrants

Same Count 867 -

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advancement -

Counts as Wells 357

2 Counts 444

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2 Counts other two

Mr Perry

Sergeant Rice -

Tompkins et al., appellants, vs. Thornton et al., appellees.

# SUPREME COURT OF THE UNITED STATES.

## ARGUMENT OF COUNSEL FOR APPELLEES.

TOMPKINS, *et al.*, appellants,

*vs.*

THORNTON, *et al.*, appellees.

It is obvious that at the death of William Tompkins, his estate, both real and personal, vested in some person or persons. His will is the title paper that designates and describes those persons and the estate which they took By apt and technical words, Rachel Tompkins took an estate for life in the real estate, and each one of the eight children was vested with the remainder in fee jointly among themselves It is therefore true, that if Beverly Tompkins was vested with a remainder in fee to one eighth part of the land, devised by the will, his vested remainder is subject to the lien of his judgment creditors, (Code Va. of 1860, 770-1, sec. 6-8.) It also follows that if Beverly Tompkins took this vested remainder, he could only divest himself of his interest by executing a deed, and that the party or parties who claimed under the deed would take his interest subject to the lien of the docketed judgments This view of the will is manifest even from a cursory view of its contents, and it has moreover been adopted by all the parties defendants to this cause; for it will be observed that Beverly conveys to Sarah and her children, to Rachel, to Charles, and his other six brothers and sisters Upon no other hypothesis can it be explained why Beverly united in the partition deed and conveyed his interest to the other parties, except that all the defendants and the skillful counsel who drew the partition deed were satisfied that Beverly took a vested remainder in fee, and that it was necessary to arrest it by a conveyance from him.

If this construction of the will thus concurred in by the complainant and all the defendants, and which is manifestly correct upon the face of the will itself, be true, it leaves little room for argument or discussion. Nor does it much matter whether the partstion deed be set aside or allowed to remain in full force. If it be set aside one seventh part of all the lands devised by the will subject only to the life estate of Rachel, is liable to the liens of judgment creditors If the partition deed be allowed to stand, the parties who take under the deed hold *one-eighth** of their separate property subject to lien of the same judgment creditors of Beverly. In either event the property is ample to pay his debts.

Sec 1, Lomax Digest, to page 409.

But it seems to be contended that Beverly Tompkins was divested of his remainder in fee by advancements made to him by Rachel M. Tompkins, the executrix. According to our view, it is difficult to conceive how a party who is vested with both the legal and equitable estate can have the same divested except by a deed of conveyance or by a decree of the court. If there is any example of such divesture in the history of English or American jurisprudence the counsel for the judgment creditors would be gratified by a citation. But admitting, for the sake of argument, that such divesture could be had, let us briefly inquire, how when and where these advancements were made. And in order to do so, it will be necessary to in-

*The partition deed divides the whole real estate into eight parts, inasmuch as it gives the widow of the Testator and the wife of Beverly, each, one-eigth part.

quire what estate Rachel M. Tompkins took in the personal property devised by the will. In the argument in the Court below, it was candidly admitted by Mr. Fitzhugh that Rachel took the entire legal and beneficial interest in the personol property This admission is no less sound than candid. See 1 Omax Digest, vol. 3, top page 116, sec. 20, 117 and 288, sec. 14—and particularly Riddick *vs.* Cohoon 4, Rand 547—4 Leigh, 409.

From these authorities it would appear, that where there is an "absolute gift to the wife of the whole property to any use she might think fit, so that she might have made a valid disposition in her lifetime of all, leaving nothing to pass by a devise over, that no valid limitation could be made after such an absolute power to dispose, coupled with an interest.—Pasman *vs.* Fileter ; 3, Vez 7

By an examination of the will in this case it will be seen that Rachel Tompkins had power to "sell and dispose of" the entire personal estate "for her own support and personal expenditure in such style as she should think proper to live." And also to "make such use and disposition of it as I (the testator) might during my (his) lifetime." It will thus be seen that Rachal has an entire power under the will to sell, use or dispose of all the personal estate for her own maintenance and support, and that under the will no person had power to question her will or caprice In the words of the cases cited, the gift to Rachael was so absolute that it left nothing to pass by the devise over; indeed the cases go further, that even where it is doubtful how large an estate is vested in the first taker and how much is intended to pass over by the devise, the devise over is void for uncertainty. If, then, as these authorities would seem to demonstrate, Rachel under the will took the entire personal estate, and her children had no vested interest therein, it is idle to speak of her making advances to Beverly Tompkins as a devisee under the will out of the personal property absolutely devised to herself An advancement, as understood by the counsel for the creditors, is the giving by the testator or his executor to the devisee *in presenti* of some portion of the estate which ultimately must be his; in other words, it hastens merely his enjoyment and use of property ultimately intended, either by reason of his being heir presumptive in the one case, or by express provision in the will in the other to be his. The clause in William Tompkins' will that purports to empower Mrs. Tompkins to make advancements to the children in money or other personal property is void, it being repugnant to the estate vested in her by the will. So far, then, as she has given money or other personal property to Beverly, it is a gift of her own free will out of her own absolute estate, and not an advancement under the will of William Tompkins If, under a misconstruction of the will, she has given to Beverly a larger estate than she intended or desired, she is a general creditor, and if she elects so to do she can obtain judgment on her open or stated account, and thus place herself in the situation of a judgment creditor and enforce her judgment in this proceeding, or if she prefers to treat it as an advancement she cun do so under own will, but not under the will of William Tompkins

In the oral arguments heretofore had in this cause the case of Harrison *vs.* Harrisons 2 Gratt, page 1, was greatly relied on by all the counsel for the defendants. An attentive examination of this case will show that no principle is decided in the case of Harrison *vs*, Harrison, which militates with the views herein expressed by the counsel for the judgment creditors. At the time of the decision of that case it is well known that the Court of Appeals of Virginia consisted of five judges. *Cabell*, Judge, being related to the parties, was absent. The opinion was delivered by *Baldwin*. It is worthy of remark that no one of the four Associate Judges concurred entirely with this opinion. *Allen*, Judge, differed from Baldwin with regard to the provision for the slaves. *Stanard*, Judge, differed from Baldwin as to the beneficial interest taken by the wife. *Brooke*, Judge, differed from

Baldwin, *toto cœlo*, and intimates strongly and roughly thae Judge Baldwin had made a new will for the testator. The case then presents this remarkable aspect, that the judgment of the Court as entered and recorded was the judgment of one man, and that it was not concurred in by the four other Judges. Notwithstanding Allen dissented from the opinion relative to the provision for the slaves, the decree decides that provision valid and binding. Notwithstanding that Stanard thought that the widow took no beneficial interest, the decree gives her a beneficial interest for her life. Notwithstanding that Brooke objected to making a new will for Randolph Harrison, the Court proceeded to make for him a new will. Surely this case neither enunciates or settles any principle; it may fix the construction of Randolph Harrison's will, but there is no such coucurrence of judicial opinion as to make it binding authority in the construction of any other will not in the same words.

But even if it be admitted, for the sake of argument, that the opinion of Judge Baldwin is binding authority upon this Court, it will be seen that there is no similarity between the will of Randolph Harrison and that of William Tompkins. Without attempting to point out the differences that exist, the following points of dissimilarity exist; that under Randolph Harrison's will the widow was vested with the legal title in fee to the whole estate real and personal. Under Tompkins' will the widow is merely vested with a life estate in the lands and a *fee* in the personal property. Under Harrison's will the widow was a trustee, with power to sell both the real and personal estate. Under Tompkins' will the widow is not a trustee for the children; she is the absolute owner of the life estate in the lands, and the absolute owner of the personal property. She has no title to or control over the remainder in fee to the land. And this latter distinction ought to be specially noted; for if under Tompkins' will the widow was vested with the legal title to the whole lands with full power of sale and disposition in trust for the children, then the estate of Beverly would be merely a future right to enjoy one-seventh part of the proceeds of the land, and it would be competent, as claimed by the defendants, for the executor to anticipate the sale of the lands and to pay his share of the proceeds of the sale in advance, and there would be no vested legal estate to be divested.

But if it be admitted that the case of Harrison *vs.* Harrison is in point and binding authority in this cause, the counsel for the creditors do not see how it can aid the defendants in defeating the remedy sought for by the bill. If, under the ruling in that case, the estate devised to Rachel M. Tompkins is a trust estate, of which she is trustee, with a beneficial interest for life, remainder to her children, with full power on her part to make advances, this Court cannot make a trust estate larger than the will itself makes it. The will expressly confines the estate devised to Rachel, whether for her own use or in trust, to a life estate in the lands. By no possible construction, therefore, can the remainder in fee, which Beverly takes by descent as heir, not under the will—3 Tomax, 106—be divested out of her children and be made to constitute a portion of the supposed trust estate. This bill is not filed to subject any portion of what may be supposed to be the trust estate, but to subject Beverly's remainder in fee in the land, which is a legal estate which he takes by descent—3 Tomax, 106. And if Rachel M. Thomkins, has, out of this supposed trust estate, consisting, as above stated, of the personality and her life estate in the lands, advanced to Beverly a larger share than he ought to have received, she is only a general creditor, and cannot divest or alter the lien which the judgment creditors have upon Beverly's remainder in fee, which is no part of the trust estate.

The reasoning of the answer would create a new species of estate for Beverly Tompkins; an estate not heretofore recognized by our laws; an estate which is not

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But even if it be admitted, for the sake of argument, that the opinion of Judge Baldwin is binding authority upon this Court, it will be seen that there is no similarity between the will of Randolph Harrison and that of Willliam Tompkins. Without attempting to point out the differences that exist, the following great points of dissimilarity exist; that under Randolph Harrison's will the widow was vested with the legal title in fee to the whole estate real and personal. Under Tompkins' will the widow is merely vested with a life estate in the lands and a *fee* in the personal property. Under Harrison's will the widow was a trustee, with power to sell both the real and personal estate. Under Tompkins' will the widow is not a trustee for the children; she is the absolute owner of the life estate in the lands, and the absolute owner of the personal property. She has no title to or control over the remainder in fee to the land. And this latter distinction ought to be specially noted; for if under Tompkins' will the widow was vested with the legal title to the whole lands with full power of sale and disposition in trust for the children, then the estate of Beverly would be merely a future right to enjoy one-seventh part of the proceeds of the land, and it would be competent, as claimed by the defendants, for the executor to anticipate the sale of the lands and to pay his share of the proceeds of the sale in advance, and there would be no vested legal estate to be divested.

But if it be admitted that the case of Harrison *vs.* Harrison is in point and binding authority in this cause, the counsel for the creditors do not see how it can aid the defendants in defeating the remedy sought for by the bill. If, under the ruling in that case, the estate devised to Rachel M. Tompkins is a trust estate, of which she is trustee, with a beneficial interest for life, remainder to her children, with full power on her part to make advances, this Court cannot make a trust estate larger than the will itself makes it. The will expressly confines the estate devised to Rachel, whether for her own use or in trust, to a life estate in the lands. By no possible construction, therefore, can the remainder in fee, which Beverly takes by descent as heir, not under the will—3 Tomax, 106—be divested out of her children and be made to constitute a portion of the supposed trust estate. This bill is not filed to subject any portion of what may be supposed to be the trust estate, but to subject Beverly's remainder in fee in the land, which is a legal estate which he takes by descent—3 Tomax, 106. And if Rachel M. Thomkins, has, out of this supposed trust estate, consisting, as above stated, of the personality and her life estate in the lands, advanced to Beverly a larger share than he ought to have received, she is only a general creditor, and cannot divest or alter the lien which the judgment creditors have upon Beverly's remainder in fee, which is no part of the trust estate.

The reasoning of the answer would create a new species of estate for Beverly Tompkins; an estate not heretofore recognized by our laws; an estate which is not

liable for the debts of its owner. From an examination of the dates of the judgments of Thornton and Hewitt, Norton & Co., and the dates of the supposed advancements as contained in the account of the executrix with Beverly, it will be seen that she claims to have paid him more than $12,000 subsequent to the rendition of those judgements. It then follows that at the date of those judgments the creditors had a lien upon Beverly,s land, whose value was more than sufficient to discharge the judgments. Yet by an arrangement between Beverly and the executrix, he receives from her more than $12,000 in cash or its equivalent, and the creditors get nothing; and their liens, although the judgments were docketed according to law, are emasculated and rendered utterly nugatory.

From the views above expressed, and which are, as these counsel humbly and respectfully conceive, conclusive of the cause, it is not by them regarded neeessary or proper to examine or discuss the accounts filed with answer of the executrix. It does not concern the judgment creditors whether these accounts be large or small; they are the private accounts of Rachel M. Tompkins with Beverly Tompkins; they are not advancements made out of the estate of William Tompkins; they are not liens upon the remainder in fee in the lands devised by the will to Beverly Tompkins.

The judgment creditors obtained a lien upon Beverly's remainder in fee in the lands on the first day of the term at which they respectively obtained their judgments. These judgments were docketed before any conveyance was made by Beverly. There is but one way known to these counsel by which that lien can be divested or discharged, and that is by the payment of the debts therein specified.

JULY 14, 1868. BECK & OTHERS.

vide
4 Rand -
4 Leigh
Doc v Constant 6 Mass 458
encumbrance by record
8 Louisa Dey